MODUS LITIGANDI,

OR

FORM OF PROCESS

OBSERVED

BEFORE THE LORDS OF COUNCIL AND SESSION

IN

SCOTLAND.

By Sir *JAMES DALRYMPLE* of *STAIR*,
PRESIDENT of the SESSION.

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PROCESS comprehends the Inſtruments and order of Procedour in the Adminiſtration of Juſtice.

By Inſtruments are meant Writs and Teſtimonies, as Oaths of Parties, Witneſſes, *&c.*

Proceſſes are brought in before the Lords divers wayes: ſome in the *firſt Inſtance*, ſome in the *ſecond*.

In the firſt Inſtance, the moſt ordinary way was, of old, by ordinary Summons, which were drawn up by the Writers to the Signet, without any Bill or Warrant from the Lords, becauſe the Stile and nature of them was current and known, in the ſame manner as the Brieves of the Chancery. But where there was any thing ſingular or extraordinary, it behoved to proceed by ſpecial Warrant of the Lords: whether it were different from the common Stile, in relation to the *D*iets or endurance of the Citation, or in relation to the Table and *R*oll by which Summons were to be called, or in relation to the mater it ſelf. And therefore a Bill was preſented to the Lords and paſs'd; and the Summons thereupon bears *Ex deliberatione dominorum concilii*, which the ordinary Summons bear not. Now moſt part of Summons are raiſed upon Bills.

Proceſſes alſo come in upon naked *Supplication* without a Libel paſſing the Signet, in ſome Cauſes, eſpecially if they concern Advocats, Clerks, Writers, Agents, and other Attendants of the Houſe; which the Lords call (upon Complaint) by the *Macers* ſummarly, and thereupon grant Proceſſe.

And now ſince the diſcuſſing of Cauſes by a *Roll* is eſtabliſhed by Act of Parliament, the Lords for diſpatch of Complaints of ſmaller moment, upon ſpecial conſideration repreſented by Bill, do grant Warrant to *Macers* or *Meſſengers*, to cite Perſons in *Edinburgh* or the *Suburbs* upon 24. Houres, to anſwer before the Ordinary upon the Bills, who diſcuſſeth the ſame ſummarly, without any ſignetted Libel, and ſo without abiding the courſe of the Roll. They do alſo upon complaint of any Contempt, as if Parties proceed to Execution where Stops of Execution are granted, ſummarly give Warrant by a Deliverance on the Bill of Complaint, to cite the Perſons complained upon whereſoever they dwell: which is ſummarly diſcuſs'd by the Ordinary upon the Bills.

Proceſſes do likewiſe come in by Letters of *Horning* without an antecedent hearing of Parties: eſpecially where Horning is ordained to proceed ſummarly by Act of Parliament, or ancient Cuſtom. So Letters are granted for the King's Revenues, and likewiſe for the Charges of Commiſſioners of Parliament, for Reparation of Kirks and Kirk-yards, and for Removing from Glebes deſigned for Miniſters, *&c.* Theſe are called *GENERAL LETTERS*, becauſe they bear not warrant to charge any particular Perſon, but generally all and ſundry concern'd, as Heretors, Liferenters, Wadſetters, Tenents, and Poſſeſſors, *&c.* And therefore ſuch Charges differ litle from other Summons, and are eaſely ſuſpended: becauſe the Party or Meſſenger has power to make the Application. But they require no *Diet* or *Continuation*: and yet the Party charged (or Defender) ere he can be heard, muſt *ſuſpend* and find *Caution*.

All other general Letters of Horning are prohibited, where either the thing charged for, is not ſpecially expreſs'd, or the Names of the Perſons charg'd: except as to benefic'd Perſons, to ſerve for an Intimation of their Proviſions, but not to denounce any Party. *Par.* 1592. *cap.* 240. Yet oftimes general Letters in other Caſes paſs of courſe: but thereupon Eſcheats fall not, though Caption doth follow. For preventing whereof the Lords by Act of *Sederunt. June* 8. 1665. did prohibite the Writers to draw, or Clerks of the Bills to write upon any general Letters of Horning either as to Benefices or modified Stipends, untill the Incumbent produce a *Decreet conform* in his own Perſon, although he produce one in the Perſon of his Predeceſſor.

Ordinary Actions may paſs without Bill, or by Bill, both paſſing the Signet. The Stiles and Tenors of ordinary Summons, and of moſt part of priviledged Summons paſſing by Bill, as now become fix'd and ordinary, are commonly known and obſerv'd by the Writers to the Signet, and are contained in their Stile-Books, which they are obliged, and every Seſſion enjoyn'd punctually to obſerve. And they will be cenſured by the Lords if they tranſgreſs, not only in the Stile of Summons without Bill, but alſo in preſenting common Bills of courſe (without ſpecial notice of the Lords) upon truſt of the Writers, and Servants in the Bill-Chamber who write the Deliverance upon the back of the Bills. The like, if the Stile be altered in general Letters or other Letters, of Horning, Diligence, and Executorials.

All theſe Warrants of the Lords contain a Command to *Meſſengers*, or *Sheriffs in that part*, to cite and charge the Parties. And in ordinary Summons th

the Citation is to a Day, which is left blank that the Obtainer thereof may make uſe of any Day he pleaſes, within a year after the Summons are rais'd.

Moſt part of Summons formerly, did abide *Continuation:* that is, the Defender being cited and the Day of compearance paſt, the Clerk marked the Summons as being *called* and *continued* till ſuch a Day: albeit in reality they they were not called, becauſe the Defender was not obliged to anſwer, till he was cited again: which was by Letters paſs'd under the Signet, making mention of the firſt Summons, of the Citation, and Continuation of the Summons, and commanding *Meſſengers* to cite the Party to the ſecond Diet, which alſo was left blank that the Obtainer might uſe it any time within a year after their obtaining thereof. Such Summons were not continued as were inſtantly verified by Writ, or needed no other Probation than the Summons it ſelf, as being *negative* or preſumed in Law to be *true*. But if the Summons behoved to be proven by the *Oath* of the Defender, or by *Witneſſes* the ſame was then to be continued except in ſome few priviledged Cauſes as in Actions of *recent Spulzie*, *Ejection*, and others. And though Summons upon Bills by the Deliverance of the Lords bare expreſly, to proceed without Continuation; yet that paſſing of courſe, was but *periculo petentis*, and the Summons behoved to be continued. The Act alſo of Continuation behoved to be extracted before Proceſs could proceed.

But now by the Act of *Par.* 1672. *cap.* 6. Acts of Continuation and ſecond Summons are diſcharged. And it is ordained, That in Caſes where ſecond Summons were before required there ſhall now be one Summons with two Diets, in which the Executions to the firſt Diet may be given by any Perſon as being *Sheriff in that part* conſtitute by the Letters. But after the Day to which the Party is firſt cited, the ſecond Citation muſt be given to a new Diet by *Meſſengers*, when any Point is referr'd to the Defender's *Oath*, with Certification if he compear not and depone, he ſhall be holden as confeſs'd.

After the laſt day of compearance is paſt, if the Purſuer inſiſt not; the Defender may compear and produce a ſhort Copy of the Citation given to him, which being delivered to a Sub-Clerk, he will thereupon call the Purſuer, of courſe, before the Ordinary comes out. And if no Advocat compear for the Purſuer, the Clerk will admit *Proteſtation:* ſo called, becauſe the Defender's Advocat doth either really compear or is reputed to do ſo, and to proteſt, That his Client being cited to ſuch a Day, and that Day paſt, (the Purſuer not compearing to inſiſt) He may not be obliged to anſwer till he be ſummoned of new again. Which Proteſtation the Clerk admits, and extracts a Sentence of the Lords, bearing them to have admitted the ſaid Proteſtation: which is a kind of Sentence *abſolvitor* from that *Inſtance*, and any thing done thereafter till new Citation will be null. If any Advocat compear for the Purſuer, the Clerk will aſſign him a Day to produce his Summons: and then will call again upon the Copy, and give him a ſhort Diet more, to produce, with Certification that Proteſtation will be admitted. And then calling the third time, the Ordinary will admit Proteſtation unleſs the Proceſs be produced. Upon which Proteſtation the Defender may raiſe a Summons againſt the Purſuer to inſiſt, with Certification if he inſiſt not, never to be heard again. Wherein if the Purſuer of the principal Cauſe appear, he will get a Day to produce and inſiſt: at which time Certi-

fication will be admitted. Or if at the firſt, the Defender compear not, the Day of compearance being paſt, if the Purſuer of the principal Cauſe appear, he gives in his Summons to a Sub-clerk who calls the ſame after the Day of compearance is paſt, though there be no Judge preſent. And if none appear for the Defender, the Clerk writes thereupon, and either *decerns* or *aſſigns a Day to prove* as the Procurator demands, or *grants Certification*. But if the Cauſe be not ordinary and obvious, the Clerk muſt adviſe with the Lords: who will conſider the *Relevancy* of the Summons, and the ſufficiency of the *Probation*, and either give *Act* or *Sentence* as they ſee juſt; or otherwiſe forbear, if the Libel be not relevant and proven.

In ordinary Caſes the Clerk extracts the *Decreet* or *Act*, as if it were done upon ſpecial notice of the Lords. If any Compearance be made for the Defenders, the Clerk then marks upon the Summons or Act of Continuation the names of the Purſuer's Advocat and Defender's in theſe terms, *Actor* ſuch a man, *alter* ſuch a man *to ſee*. After which there can be no further procedure till the Proceſs be ſeen by the Defender's Advocat. And if there be ſeveral Advocats for ſeveral Defenders, the Proceſs is marked to be ſeen in ſuch a mans *Houſe*, where they ſhould either conveen to conſult their ſeveral Intereſts, or borrow the Proceſs for that effect, and return it. But the Purſuer doth more ſafely, when he takes back the Proceſs from the firſt Party, and gives it to be ſeen ſeverally to the reſt. For otherwayes they will delay him when they come to the Diſpute, and will at leaſt get liberty to ſee the Proceſs in the Clerks hands till the next Calling, that in the mean time they may borrow the Proceſs from the Clerk (upon their Receipt) and ſee the ſame.

Proceſſes were accuſtomed not only to be *ſeen* and *called* once every Seſſion, and if they were not marked by the Clerks ſo called, there could be no Proceſs till a Summons of *Wakening* was raiſed: for they were not only ſaid to be *aſleep* in the mean time, but alſo the Defender's Advocats were not obliged to anſwer, unleſs they had ſeen the Proceſs that ſame Seſſion. But ſince the Act of *Regulation*, a Proceſs being once ſeen is not to be ſeen again, unleſs there be *Alterations* in the Summons, or new *Productions*. Yea when the Proceſs hath not been called for a whole year, and that thereupon there be a Citation upon a *Wakening*, the Cauſe goes on as it ſtood in the Roll before, and is only ſeen with the *Wakening* in the Clerks hands.

The Purſuer's Advocat when he gives out the Proceſs to be ſeen, writes upon the back thereof, *Given out by &c. to &c. to be ſeen*, and ſubſcribes the ſame. And after two or three dayes calls for the Proceſs back. He doth alſo ordinarly write an Inventary of the Proceſs apart, or upon the back of the Summons, and the Defender's Advocat by accepting of the Summons, is preſumed to have received the ſame the day mentioned upon the back of the Summons; and to have received the Peeces of the Proceſs mentioned in the Inventary: becauſe if theſe be not truely ſet down, he may refuſe to accept of the Proceſs. If then the Defender's Advocat deliver back the ſame, he muſt write upon the back, that they are *ſeen by him* and ſubſcribe his name. Which if he refuſe to do, and to give back the Proceſs, the Purſuer by a Ticket may complain to the Preſident, or Ordinary upon the Bills, who will call the Defender's Advocat and amerciat or fine him, till he produce. Or otherwiſe the Purſuer upon a Copy of the Summons, may cauſe the Sub-clerk call the Defender's Advocats to reproduce the Proceſs, With *Certification* that if he do not, his Copy

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will be holden as a principal, and *holden as proven*, whereupon the Defenders will be *decerned*. Which Certification being admitted, a *Decreet for not Reproduction* may be extracted, which will have all Execution as any other Decreet in absence: and albeit it be more easily suspended, yet not ordinarly without Caution.

But for the Security of Parties, that they may not be wronged by the Clerks, all that passes every day, is mentioned in the *Minute Book*: which Book is read in the *Outer-House* every day after twelve a clock, and nothing can be extracted till it be read in the Minute Book and twenty four Hours thereafter; that in the mean time either Party may compear and produce, or take up the Process and get the Decreet delet out of the Minute Book, and oftimes at the very reading of the Book, they compear and get it delet.

If the Pursuers after the Process is seen, make any alteration therein by production of new Writs, and altering or mending of the Summons; the Defender must see of new again the Peeces of the Process, or the Pursuer's *Title*, where there is any required to be produced, (which is in most Causes) and which instructs the Pursuer's Right, as the *Summons*, or *Charge*, with the *Executions Acts* of Process, and Writs produced for *Probation*.

Processes allowed to be seen in the *Clerks hands* being kept up beyond the time appointed, upon Complaint from the Clerk, they are ordained to be delivered the next day under a certain Penalty, as ten or twenty Dallers. And upon the second Complaint, Warrant is given to debar Advocats from coming within the Barrs, and to incarcerat Agents and Servants, till the Process be reproduced and the Fine payed.

Processes being thus seen and ready for Dispute, the same are *inrolled* according to the Dates of the *Return* marked upon the backs thereof; he who is first ready being first to be discuss'd, without preference of the Parties: except the Kings Causes, which after sight may be called without inrolling, at any time upon 14. dayes Intimation to the Defender's Advocats, wherein *Donatars* Processes are not comprehended.

Which Rolls being affixed on the Walls of the *Outer House* Parties and Advocats may inform themselves, to be in readiness to dispute without surprisal, or tergiversation.

Ordinary Actions after they are *seen*, *returned* and *inrolled* are called by the *Roll*. If the Pursuer compear not to insist, the Defender may crave *Protestation* upon his *Copy*. But ordinarly the Pursuer compears, and relates the Cause shortly, if it be an ordinary Summons, the tenor and nature whereof is fixed and known; which therefore he needs not relate, but only mention the Summons and crave Decreet, if there needs no further Probation: and if there do, he then craves a Day *to prove*. But if the Cause be upon a libelled Summons, not having a particular known Stile, the Pursuer doth more fully relate, not only the tenor of his Summons, but the merits of his Cause, to inforce the *justness* and *equity* of the Cause in particular: unless the Lords upon hearing the relation of the Summons stop him, till it appear whether the Defender controvert the *Relevancy* thereof, yea or not. For it is an improfitable spending of time, for the Pursuer to inforce the Relevancy of the Summons, if the Defender controvert not the same. In the next place, the Defender if

he reſolve to dip upon the merits of the Cauſe, or to adhere rigorouſly to exact *form* in the order, then he relates the merits of the Cauſe, and odiouſneſſe of the Purſuit, and thereupon proceeds to his Defenſes.

Defenſes do not only comprehend *Exceptions* properly ſo called, but all *Objections* againſt the *Relevancy* of the Summons, *Order*, and *Intereſt*. And therefore the Defender propones his Defenſes againſt the Order of the Proceſs; and firſt, *That the Day of compearance is not yet paſt*. And becauſe the Day of compearance in the Summons and Letters by negligence is left blank, the Defender uſes to ſcore the ſame, or to fill up a wrong Day, and to object thereupon. But if the Day of compearance be mentioned in the Execution, it will be ſufficient, albeit the *Blank* be ſcored: and if it be wrong filled up, the Ordinary will ſometimes cauſe the Clerk immediatly mend it, and ſo proceed. And at other times doth as he ſeeth the Cauſe favourable, or not.

The *ſecond Defenſe* is upon the Dayes of Citation: wherein the common Rule is, that againſt Perſons without the Kingdom, Citation ſhould proceed at the Mercat Croſs of *Edinburgh* and Peer and Shoar of *Leith*, upon *threeſcore* Dayes for the firſt Summons, and *fifteen* Dayes for the ſecond; and for Perſons within the Kingdom upon *twenty one* Dayes for the firſt and *ſix* for the ſecond.

From this Rule are excepted Summons upon *recent Spuilzie*, *Ejection*, *Intruſion*, or *Succeeding in the Vice* of Perſons againſt whom Decreet of *Removing* is pronounced, which are priviledged by Statute to proceed upon a Citation of *fifteen* dayes. And by Cuſtom *Removings*, Cauſes *alimentary*, *Exhibitions* Summons for making arreſted Goods or Sums *furthcoming*, *Transferrings*, *Wakenings*, *Poindings of the Ground*, *ſpecial Declarators*, *Suſpenſions*, *Prevento's*, and *Tranſumpts* are commonly priviledged by the Lords Deliverance upon *ſix* Dayes. And the ſecond Citation when it is needful is always upon *ſix* dayes except againſt the Inhabitants of *Edinburgh*, and the *contiguous* Suburbs thereof, where the ſecond Citation may be upon *twenty four Hours* which is declared by Act of *Sederunt*. *June* 21. 1672. concerning *priviledged Summons*. And the Writers to the Signet are prohibited to inſert any other Priviledge.

The *third Defenſe* is, That the Summons hath not two Citations conform to the Act of Parliament 1672. For clearing whereof it is to be conſidered, that the reaſon of double citation is, that the Defender may have more Citations before any Proceſs be ſuſtained againſt him, not only to give him competent time to propone his Defenſes, but to aſcertain him of the Citation, which is ſome times clandeſtinely done, but not ſo eaſily when there are reiterat Citations.

Some times Cauſes are priviledged to proceed upon one Citation by *Law* and *Cuſtom*, and ſometimes by the Lords *Deliverance*. The Law allows no Continuation of *recent Spuilzies*, *Removings*, and Actions acceſſory to the Lords Decreets, as *ſpecial Declarators*; unleſs the Cauſe be of the greateſt importance, as *Reductions*, *Declarators* of *Property*, and *Declarators* of *expyring of Reverſions*. For though theſe require no further Probation either by Writ or Oath of Party; yet becauſe of their importance they muſt be continued. And ſo muſt all Summons which are to be proven by the Defender's *Oath* of Verity, or by *Witneſſes*.

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The *fourth Defenſe* is upon the tenor of the *Executions*. As *firſt*, if the Purſuer crave the Defender to be holden as *confeſs'd*, then the Defenſe is, That he was not *perſonally apprehended* by a Meſſenger at Arms, or That the Execution bears not that a *Copy was delivered:* but if it bear a *Copy delivered* it will be ſufficient, albeit it bear not *perſonally apprehended*, becauſe it doth import it. *Secondly*, if the Defender was not cited perſonally but at his *Dwelling-Houſe*, the Execution will be null if it bear not, That the Executer gave *ſix Knocks at the moſt patent Door* or Entry of the Defender's Houſe, deſigning the ſame, and that he either *delivered a Copy to the Wife, Bairns, or Servants*; or that he *affixed a Copy upon the moſt patent Door* or Gate. It muſt alſo contain *two Witneſſes* at leaſt: and it muſt be *ſtamped*. If any of theſe be omitted the Execution will not be ſuſtained. But the Purſuer may take up his Summons and mend the Executions, abiding by the verity thereof: and it muſt be ſeen again by the Defender.

The *fifth Defenſe* uſeth to be upon the Purſuer's *Title*, whereby the Defender alledgeth, No Proceſs, becauſe the Purſuer produced no ſufficient Title *in initio litis*. As if an Heir purſue without production of his *Retour*, an Executor without a *Confirmation* or *Licence*, an Aſſigny without an *Aſſignation*, &c. And almoſt in every Proceſs, that does not meerly conſiſt in *facto*, a Title in Writ muſt be produced *in initio litis*: whereupon there ariſeth much debate, (and very divers and different,) what *Writs* muſt be produced as the Title *in initio litis*, which were too tedious here to relate.

The *ſixth Defenſe* is upon the Intereſt of the Defenders *not cited*: whereby the Defender alledgeth, That all Parties having Intereſt *are not called*. As if a Pupil were called without his Tutor's being called, at leaſt in general, at the Mercat Croſs where the Pupil dwells: or if a Vaſſal be called in the Reduction of his Right, or in a Declarator of Property and Cognition of his Marches, without calling of his Superior. But this yeelds no Defenſe for principal Debitors, or for Cautioners bound *conjunctly and ſeverally* as Principals: for one of them may be called withoue the reſt.

The *ſeventh Defenſe* is, the order of *diſcuſſing*: whereby the Defender alledgeth, No Proceſs againſt him till ſuch other Parties be *diſcuſſed*. As Cautioners not being bound *conjunctly and ſeverally as full Debtors*, are not liable till the Principals be diſcuſs'd. And ſo Cautioners for Tutors or Executors are not lyable, till the Tutors or Executors be diſcuſs'd. So Heirs-male, till the Heirs of Line be diſcuſs'd; nor Heirs of Tailzie, till the Executors, Heirs of Line, and Heirs-male be diſcuſs'd.

The *eighth Defenſe* is, That the Libel, or ſome member thereof, is not *relevant*: For clearing whereof it is neceſſary diſtinctly to underſtand what the *Relevancy* is, which is ſo frequent and important a Term in our Law. Relevancy is a *relevando*, to relieve or help: and therefore a thing is ſaid to be relevant, when, if it be *true* and *proven*, it would relieve the Purſuer or Complainer, and give him the Remedy which he infers and concludes in his Libel, and craves to be done as due by *Juſtice*. For every ſufficient Libel contains an argument or ratiocination, ſometimes in form of a *Syllogiſme*, when the point of Law is firſt deduced, as the *major* Propoſition; and then the matter of Fact is related, as the *minor* or *Subſumption*: and thence the *Concluſion* is inferred as conſequent in Juſtice, applying the Law to the Fact ſubſumed, and craving the Remedies of that Law to be applyed to this Fact, for the help or

remedy of the Purſuer in his Complaint. And therefore in the Libel he is called *Complainer*. But more frequently Libels are framed as an *Enthimeme* wherein the matter of fact is deduced as the *Antecedent*: and it is thence inferred that in Juſtice ſuch remedy ſhould be adhibited. Where ſometimes, after the matter of fact is deduced, and before the *Concluſion* or Remedy craved, the Law is mentioned: either *generally*, That the Fact related as done or omitted by the Defender, is contrary to Law, Equity, Reaſon, or Juſtice; or *ſpecially*, contrary to ſuch Points of Law. Or otherwiſe it is ſubjoyned to the *Concluſion*, That upon the matter of Fact libelled, it ought to be declared or decerned as is libelled, according to Law, Equity, or Juſtice: or particularly according to ſuch Points of Law. So then the Relevancy of the Libel or Complaint, is the *Conſequence* of the *Concluſion* of the Libel, from the *Premiſſes* thereof. Or it is the *Juſtice* of the Libel, or the *Sufficiency* and *Goodneſs* of the Plea. And the *Probation* is the *Verity* or *Truth* of the Libel. So that the Remedies of Law proceed upon Juſtice and Truth.

The effect is the ſame in *Suſpenſions* and *Reductions*, though the form be different. For the *Concluſion* or Remedy of Law is firſt propoſed: and the *Premiſſes* are ſubjoyned, as Reaſons for adhibiting the Remedy propoſed. Every Reaſon being a ſeveral *Syllogiſme* or *Enthimeme* inferring the propoſed Remedy, and in effect a ſeveral Libel.

If the Libel be inſtantly verified, and require no further Probation, as when the Law preſumes it to be true, or when it is inſtructed by Writ; or when the Defender is craved to be holden as *confeſs'd*; or there is any other Certification containing a *preſumptive Probation*, as that, if Writs be not produced, it is preſumed to be becauſe they dare not abide Tryal, but would be found *falſe* or *null*, therefore if they be not produced, they are declared to be holden as *falſe* or *null*; in theſe Caſes, if the Libel be inſtructed, there is nothing can be controverted but the Relevancy, Inference, or Juſtneſs of it. And therefore the Defenſe, That the Libel or ſuch a Member of it *is not relevant*, imports this, That the Concluſion craved is not *juſt*, or that there is no ſufficient ground for it in *Law* or *Equity*. And therefore the Purſuer muſt condeſcend upon what ground of Law or Equity he foundeth, unleſs it be clear and evident to the Judge. In which Caſe, without putting the Defender to anſwer, he *ſuſtains* the Libel: that is, he finds that if the Fact related be *true*, the Remedy craved is *juſt*. And if he find the Libel relevant, and *inſtantly verified*, he *decerns*: either *ſimply* in all points according to the Libel, or in part, finding ſome Members of the Concluſion juſt, but others not juſt; or *qualificatè*, when he finds the Concluſion juſt, but not in the way that it is demanded, and grants it as it ought to be demanded. Which is ordinarly done in *favourable* Caſes: nor will the Decreet be quarrellable as *ultra petita*, or diſconform to the Libel. But if the Caſe be *unfavourable*, he may forbear to qualifie the Concluſions, and aſſolzie *a libello ut libellatur*: which will not exclude new Summons, where the Concluſion is rightly qualified: as neither will an *Abſolvitor* in a Reduction, exclude a *Reduction* in the ſame Cauſe, upon *new Reaſons* upon *different* points of *Fact*, or *differently* qualified. But it is not ſo in *Suſpenſions*: where the Decreet ſuſpended not having taken effect by Execution, the Suſpender remains in effect *Defender*, and the Charger who obtained the Decreet, is ſtill *Purſuer* to get his Decreet put to execution. And therefore whatever *Reaſons* were competent and omitted in the firſt Suſpenſion, are not receivable in any poſterior Suſpenſion. But if the Libel be *ſimply* relevant, the Judge doth *ſimply* aſſolzie.

If

If the Libel be not inſtantly verified, the Purſuer craves no *Decreet*, but a *Term to prove*. And the Queſtion will ſtill remain, Whether the Libel be relevant, that is, Whether if it were proven to be *true*, it would alſo be *juſt*. For *fruſtra probatur quod probatum non relevat*.

Relevancy comes to be debated, not only as to Summons and Libels, but as to *Exceptions*, *Replys*, *Duplys*, *Triplys*, or *Quadruplys*, &c. which will not be ſuſtained or admitted to Probation, if they be irrelevant, and would not relieve or avail the Proponer. It is to the ſame effect when the Diſpute is, Whether the Defenſe, Reply, *&c.* be *good* or *ſufficient*. For the goodneſs or ſufficiency thereof is the *juſtneſs*, or Relevancy of it. But the Term *Relevancy* is moſt formal and frequent with us, and more than with any other Nation. The *Roman* Law, and the Nations that follow that Law, do but ſeldom mention it: and the *Engliſh* know it not. But their Diſpute to the ſame purpoſe, is of the *ſufficiency* or *goodneſs* of the Plea, or Defenſe, *&c.*

Yet we do never adhibite the term *Relevancy*, but to a matter of Fact *proven* or *to be proven*, whether in the Libel, Exception, Reply, or Duply, *&c.* But when the Alledgence is only an *Objection*, we do not debate whether the Objection be relevant. As when Writs are adhibited to inſtruct a Libel *ab initio*, the Ordinary will hear the Diſpute upon the Writs produced, and the Objections made againſt the ſame. Wherein the terms are not, That the Writs are not relevant, but that they *inſtruct* not, or that they are not to be *reſpected* for ſuch reaſons: and the Purſuer endeavours to inforce the ſame, and anſwer the Objections. In all which it is improper to mention *Relevancy*.

The *ninth Defenſe* is upon the *Competency*, Whether the Suit be competent *hoc ordine*. For albeit the Libel be *relevant*, yet it may not be *competent*.

Exceptions, ſo properly called, are not founded upon the *Defects* of the Purſuit, but are founded upon ſome poſitive *Right* or Fact, diſtinct therefrom, *excluſive* thereof: and that either for a *time*, or for *ever*. Thoſe Exceptions which exclude the Defenſe but for a time, are therefore called *Dilators*: thoſe which elide the Cauſe for ever, are therefore called *Peremptors*, *quia perimunt ſeu deſtruunt cauſam*. And albeit Dilators may aſſolzie the Defender *ab inſtantia aut lite*, yet never *à cauſa*. And therefore ſome Dilators are more properly termed *peremptoriæ inſtantiæ*. To make both clear by example; in the moſt frequent Purſuits, as in Actions for Debts, if the Defender alledgeth that the Purſuer cannot inſiſt for *payment* of the Debt, becauſe the Debitor by his Promiſe or Writ is engaged not to ſeek the Sum for a time, or hath renounced or diſcharged Action or Sentence; if the time be not very long to come, Sentence will be pronounced, ſuſpending execution till that time: which *qualifies* the Sentence, and is *dilatory* as to the *execution*. But if there be an abſolute Paction upon the Debitor's part *de non petendo*, or that the Defender hath his Diſcharge or Renounciation of the Debt, or if the Defender alledge *Payment* or *Compenſation*; theſe Exceptions are *peremptory*, which if proven will aſſolzie the Defender for ever. And though commonly all Defenſes, whether they be *Exceptions* or *Objections*, are called *dilatory*, if they do not abſolutely determine the Cauſe: yet it is clear what difference is betwixt an Exception and Objection: the Objection being only the alledging of a *Defect* and *Nullity* in the Purſuit, and therefore are *partes judicis*, which if he do ac-

curately notice, although there were no Defender, he would not decern. As if there were an Act or Sentence craved before the Day of compearance were come, or if the Summons were not upon the Dayes requiſit by the Law, or if the Executions were defective in the Requiſits ordained by Law, or if the Libel were not *relevant*, or any member thereof, or were not *competent* in ſuch a Proceſs: all which reaſons are *negative*, and require no further Probation. But proper Defenſes are *poſitive* and are not proper to the Judge to ſupply: and are not founded upon *deficiency* of the Proceſs, but upon ſome poſitive *Right* or *Fact* competent to the Defender.

Dilators muſt be inſtantly verified, and there can be no Term aſſigned for proving thereof. *Secondly*, they are not competent to be proponed after proponing of Peremptors. *Thirdly*, all Dilators muſt be proponed together, or at leaſt at the ſecond Calling, that they may not be drawn in length.

As to the firſt, that Dilators muſt be *inſtantly verified*, the reaſon is becauſe they do not determine the Cauſe, and to run a courſe of Probation for inſtructing a Dilator, were tedious and expenſive, and not worthy of the work. Therefore Defenders are to prepare themſelves, and have in readineſs the Writ or Witneſſes to inſtruct the Dilator, which will be received without any Citation or Diligence, but being inſtantly called by a Macer will be admitted. For inſtance, if a Tenent be purſued to remove, and alledge, All Parties intereſſed are not cited, *viz.* his Maſter, to whom he is Tenent by payment of Maill and Duty before warning: this is a Dilator, and it muſt be verified *inſtanter*, that the Perſon he condeſcends upon was his Maſter before the warning: which may be done either by production of his Maſter's Diſcharges, or by Witneſſes, if they be in readineſs. Yet in ſome Caſes a Term may be granted to inſtruct a *Dilator*, as if the Defender have a Superſedere of the Purſuer for a conſiderable time, or a probable cauſe for which he hath not the Writ in his own hand: if he make faith *de calumnia*, he may get a ſhort time *cum onere expenſarum*. Which is moſt fully performed without aſſigning a Term or *Diet* to inſtruct the *Dilator*, but repelling it as not inſtructed, yet ſuperſeding the extract of the Act or Decreet for ſome ſhort time, that if in the mean time he Defender produce the ſame, it may be received.

If a Dilator be ſuſtained, the Defender may extract the Sentence thereupon, which in effect is an Abſolvitor from that *Inſtance*. And if the Purſuer do not mend the Executions and Libel before it be extracted, he will not be heard thereupon till new Citation.

As to the *peremptory* Exceptions this is a Rule, that *exceptio falſi eſt omnium ultima*. and after *Improbation* is proponed the Defender can return to no other Defenſe, unleſs it be emergent, or new come to his Knowledge. But where Improbation is not by *Exception*, but by way of *Action* joynt with Reaſons of Reduction, the Reaſons of Reduction and Improbation may be inſiſted in together, and Probation allowed in both joyntly, or ſeverally, becauſe they are but two Libels in one Proceſs.

When a Peremptory is proponed, the Diſpute then runs firſt upon the *Competency* thereof, and next upon the *Relevancy*; both which are the *Objections* againſt the Exception, and are not *Replys*. For as the Exception is upon ſome Right or Fact poſitively alledged, eliding the Libel, albeit defective in nothing; ſo is the Reply to the Defenſe, and the *Duply* to the Reply, *&c.*

As

As to the *Competency* of Defenses, the chief Objection is, That such an Alledgence is not receivable by way of *Exception* without *Reduction*. As if any person be pursued upon a Bond, and alledge *Minority* and *Læsion*, or alledge *Interdiction*, or that the Bond was granted by his Predecessors *in lecto ægritudinis*; these will be repelled as incompetent. Much more, if in any Pursuit upon a real Right, it should be alledged to be *a non habente potestatem*. So also *nullitates facti* upon Clauses of Failzie, bearing that in such and such Cases such Rights should be null, are incompetent by way of Exception, even albeit the Clause bear that the same shall be null *without Declarator*: for the Lords notwithstanding, will not sustain the same without a preceeding Declarator. If these Provisions be *penal*, the Lords will also allow the Parties to purge the Failzie, by performance at the Bar, in the Declarator: and therefore not sustain such Alledgences by *Exception*, or by *Suspension*; but by Reduction, or Declarator: especially in heritable Rights, and matters of great moment. Though in matters of small moment, when the Parties are poor, they will indulge that favour, which is competent to them by the eminency of their Office, whereby they are not altogether straitned by the limits of ordinary Form. For albeit the Act of Parliament 1621. against *fraudulent Alienations* make them null by Exception, or Reply; yet the Lords do not sustain it, in regard that no Infestment can be taken away, without the Superiors and Authors be called.

But *Nullities in Law*, whereby there is a visible defect in the Solemnities requisit to a Writ or Right, which requires not the calling of a third Party; are competent by way of Exception, or Suspension: and in effect are rather Objections, than Exceptions. As, That a Writ is null by the Act of Parliament 1540. because it wants Witnesses: or because, the Witnesses, or Writer, or both are not designed: or because, being a Writ of importance, it is subscribed by one Notary, and not by *two* Notaries and *four* Witnesses.

Against the Defense of Nullity upon the want of Witnesses, this Reply is relevant, That the Writ is *holograph*, all written and subscribed with the Granter's own hand; which is probable by Witnesses: not only if they prove, That they saw the Writ subscribed; but if they positively affirm, and clearly cognosce, That it is the ordinary Hand-writ of the Party, both as to the Body and Subscription. Against which Reply, this Objection is competent; That the point to be proven, is concerning the *Date*, or time of the Subscription: which the Writ cannot instruct, albeit it be proven *holograph*. Yet the Lords will sustain the same, if it be proven by other Adminicles, and Witnesses who saw the Writ subscribed of the Date it bears; or who saw the Writ before the time in question: but such Witnesses must be *above all exception*. As when a Discharge granted by a Cedent, is excepted on, against an Assigny; who if he alledge, That it is null, as wanting Witnesses, and the Defender in fortification of his Defense offer to prove, That it is *holograph*: and the Pursuer yet objects, That it cannot prove the Date; the Defender in fortification of his Defense offering to prove by Writs relating to the Discharge, or Witnesses above exception, That they saw the Discharge as it now stands, before the Intimation of the Assignation; the Lords will sustain the Defense, if so fortified. Which albeit it appear to include a Duply, and Quadruply; yet it is but a complex Defense: seing as to the members thereof, there interveens no Reply, nor Triply, but only two Objections: which the Lords upon advising, might supply, albeit not objected by the Party. As if in a Reduction of a Bond against an Assigny, as being payed before the Intimation, or Assignation; if the Defender be absent, and a *ho-*

lograph Diſcharge be produced, the Lords, if they advert to it, will not find the Reaſons proven, unleſs the Purſuer prove it *holograph*, and inſtruct the Date thereof to be true, or at leaſt anterior to the Intimation.

The *Nullity* of the want of the Writer's name inſert, or the Witneſſes, is elided by condeſcending upon the Writer, and his deſignation, and upon the Witneſſes: ſeing thereby the intent of the *Act* of *Parliament* is fulfilled, which is that there may be means to improve ſuch Writs if queſtioned.

All theſe hold not in Writs that are regulat by the Law of Nations, and not by the proper Law of our Country, in which the Conſuetude of Nations is ſufficient to aſtruct the Writ: as *Bills of Exchange*, *Orders*, *Letters of Advice*, *Accompts*, and *Receipts* amongſt Merchants, which do require no ſuch Solemnities.

And in like manner Writs not made in *Scotland* but abroad, *ſecundum conſuetudinem loci*, are valid without theſe Solemnities, and take effect in *Scotland*. But the Cuſtom of that Place's obſerving, or not obſerving ſuch Solemnities, muſt be inſtructed. As Writs ſubſcribed by one *Tabellion*, in *France*, and *Germany*; and Writs *ſealed and delivered*, in *England*, or *Ireland*; prove, though the Writer be not mentioned, nor the Witneſſes deſigned. But in theſe two Kingdoms, if the Writ bear only to be *ſigned*, but not to be *ſealed and delivered*; it doth not yet prove, till it be approven by the Oaths and Teſtimonies of the Witneſſes.

In proponing of Exceptions, the Defender ought not to give Reaſons for the Competencie, or Relevancy thereof, unleſs the Judge call for them: as when they are not ordinary, and appear not to him relevant and competent, though there were no anſwer made. Otherwiſe, having repeted his Defenſe, he ſhould be ſilent, untill he ſee if the Purſuer object againſt the Competency or Relevancy thereof; or whether he propone a proper Reply, to elide the Exception, without further Debate. In which the Diſpute goes over to the Reply, and ſo unto the Duply, untill the Point be diſcuſs'd. The Defender may alſo propone ſeveral Defenſes, which, if found relevant and competent, he will be heard upon all. And what he omits, that was then competent, will not be receivable in the *ſecond Inſtance*, by Suſpenſion, or Reduction: nor will be admitted after *Litis conteſtation*, unleſs it be then *inſtantly verified*, or be *emergent*, and new come to Knowledge. The reaſon is, that Proceſs be not drawn in length, to the vexation of the People in their Rights, by perpetuating of uncertainty of Plea. Which was alwayes uſed as neceſſary in *ordinary Actions*; and now of a great while, alſo in *Suſpenſions*: the reaſon being alike in both.

Exceptions are ſo various and many, that it is not proper here to enumerat, much leſs to explain them: what we intend by this, being but to give a ſhort view of the *forme* and not of the *matter* of Proceſs. It ſhall ſuffice to name ſome few moſt common and moſt ordinary.

Beſides what hath been ſaid of Defenſes before, and beſides the obvious Exception of *Satisfaction*, *Payment*, or *Diſcharge*, and the *Perſonall* Exception againſt perſons being *Rebells*, and ſo not having *perſonam ſtandi in judicio*; which will exclude the Purſuer, till it be elided by *Relaxation*, or till the Rights and Proceſs be aſſigned, for then (it being perſonal) it will not follow the Aſſigny: which is alſo competent againſt the Defender, whom though the Purſuer hath called to appear, yet he may hinder him by Horning, but cannot hold him as

confeſt

confeſt, if he will not ſuffer him to depone: for albeit the King's Officers might exclude him, yet Horning being but a *civil Rebellion*; it is againſt reaſon, that he that provokes him to Judgment, ſhould exclude him from it. Wherein nevertheleſſe, Purſuers will ſometimes be ſo cruel as to crave the Defender to be holden as confeſt; albeit they wil not ſuffer him to compear, and depone, which the Lords do not admit. *I* ſay, beſides theſe, there are further the common Exceptions of *Præſcription*, *Renounciation*, *Innovation*, *Tranſaction*, and the Exception *rei judicatæ*, and *litis conteſtatæ*.

Præſcription was once as large as *Exception*, till it was appropriat to this chief kinde of Exception. We have many Præſcriptions in *Scotland*. As 1. of a *Year*: and ſo *Tutors of Law* not ſerving themſelves within a Year, their Intereſt præſcribes, and there is place for a *Dative*. 2. Of *three Years*: ſo *Inqueſts* can not be called in queſtion by *Summons of Error*, ſo as to inferr any prejudice againſt the Perſons of *Inqueſt* after three Years. *Recent Spulzies*, as to their ſpeciall Priviledge of *ſummar Proceſs*, *Oath* in litem, and *violent Profits*, præſcribe, not being intented within three Years after the Warning. So alſo Actions for Houſe-maills, Servants-Fees, and Merchants Compts, præſcribe, as to the manner of Probation by Witneſſes, if not intented within three years: and are then only probable *ſcripto*, *vel juramento*. So the Preference of the Creditors of the Debitor, to the Creditors of the Heir in affecting the Eſtate of the Defunct, by the *Act* of *Parliament* præſcribes in three years. 3. In *four Years*, the Action of Reduction upon *Minority* and *Læſion* preſcribes, after the Partie's Majority. 4. In *five Years*, the Right of any holden and repute *Heritable Poſſeſſors*, (& ſo poſſeſſing for five years,) præſcribes ſo in the caſe of Forfaulture, that if the Poſſeſor be *forfaulted*, & the KING ſucceed; all other Parties Rights are excluded, unleſs they have interrupted the Poſſeſſion, and raiſed Proceſs within five years before the *Forefaulture*. 5. The effect of *Infeftments of Property*, and *Poſſeſſory Judgments* thereupon, præſcribe by the Defender's poſſeſſing *ſeven Years*, by vertue of an Infeftment, or Tack, from a third Party: ſo that thereby Actions for *Maills and Duties*, or *Removings*, are excluded, and the Defender's Right cannot be taken, away but by Reduction, being clad with ſeven years lawful Poſſeſſion. 6. The *legal Reverſion* of Appriſings which did expire or præſcribe, by ſeven years after the Date of the Appriſing, doth now expire and præſcribe by the courſe of *ten years*, from the deducing thereof. And of Adjudications, the Legal expires in five years, if they be *ſpecial*; and if *general*, in ten years. 7. *Summons of Error*, or *Reduction* of *Retours* deduced ſince 1617. do præſcribe, if the Summons be not intented within *twenty years* after the Service. 8. And *laſtly*, Heritable Rights, and all other Rights præſcribe, if not purſued, nor poſſeſſed by, during the ſpace of *fourty years*.

The Exception of Præſcription of 40. years, is elided firſt by the Reply of *Minority*, becauſe that Præſcription runs not againſt *Minors*: and therefore there muſt be 40 years, beſides the years of their Minority. 2. All Præſcription are elided by *Improbation*, becauſe the Caſe of *Falſhood* is excepted. 3. The Præſcription of *three years* as to the quarrelling the Perſons of *Inqueſt*, runs not againſt Minors, or *Abſents fourth of the Countrie*. Neither doth the *Præſcription* of the *Legal* of Appriſings, run againſt Minors. And if a Major ſucceed to a Minor, he hath a *Year* after his Succeſſion to redeem. 4. And *laſt* of all, Præſcriptions are elided by *Interruption*, in the manner preſcribed by Law: whether the Interruption be by *natural* Poſſeſſion, or *civil* by intenting competent Proceſs, or by legal Acts or Inſtruments.

Renounciation is a common Exception: whereby the Purſuer renouncing the Right or Action, he (or any repreſenting him,) is thereby excluded there-

from. But in *Real Rights*, ſingular Succeſſors will not be excluded by Renounciation, unleſs there had been a Proceſs againſt the Partie Renouncer, whilſt he had Right, whereby the matter became *litigious*, which is *vitium inhærens*, deſcending to ſingular Succeſſors. But in all *Perſonal Rights*, the Renounciation of him who hath Right for the time, is valid, not only againſt his Heirs, but againſt ſingular Succeſſors.

Innovation is alſo a common Exception: whereby any new Right is given, not in *Security* or *Corroboration*, but in full *Satisfaction* of a former Right; whereby that former Right is extinct, and there can be neither Action nor Defenſe thereupon.

Tranſaction is alſo a common peremptory Defenſe: for thereby the former Right is either taken away in *whole*, or in *part*, and in ſo far only is the Defenſe peremptory. For there can be no Tranſaction, (properly ſo called,) but where the Right tranſacted is either innovat, or ſimply renounced, or quit for a Sum of Mony, or an onerous Cauſe, or at leaſt abated.

Exceptio rei judicatæ, is where the ſame Cauſe now purſued, hath been judged before, and decerned. For there is no new Proceſs thereanent can be ſuſtained: elſe there could be no end of Pleas. But this Exception is elided by ſeveral Replyes. As if the Purſuit be indeed for the ſame effect, but not *ſuper eodem medio:* as when the Perſon purſuing, purſues as *Executor* for a Debt, and the Defender alledging that the Debt is *Heritable*, be aſſolzied; if the Purſuer thereafter enter Heir, and purſue *ſuper hoc titulo*, the Abſolvitor will not exclude him. And ſometimes, though the *medium* be the ſame, and have been referred to the Defender's *Oath*, and he thereupon be aſſolzied; yet if *Writ* after be emergent, that doth not infer Perjurie, or contradict the Oath, but proveth more nor what the Defender knew, or remembred; it will not be excluded by an Abſolvitor upon the Oath: eſpecially if the Deponent was not *poſitive*, but *to his Knowledge* and *Remembrance*.

The Exception of *Litisconteſtation* is rather a *dilator*, than a *peremptor* Exception, becauſe thereupon the Cauſe is not determined. But the Purſuer may be thereby excluded from any other Proceſs, without prejudice to him to inſiſt in that wherein *lis eſt conteſtata*: unleſs the new Purſuit be different from the former, at leaſt *ſuper diverſo medio*.

All the foreſaid common Exceptions are aſwel competent by way of *Reply*, *Duply*, *Triply*, or *Quadruply*, as by *Exception*; and may be libelled upon, as good *Reaſons* of *Suſpenſion*, *Reduction*, or *Declarator*.

In all Proceſſes whatſoever whether in ordinary Actions, or in *Reductions*, and ſometimes in *Suſpenſions*, *Litisconteſtation* may be made. Which is done when thoſe Points which are to be proven on either part, are diſcuſſ'd and determined, as to the *Relevancy*, and *Competencie*; and that is put to *Probation* which will end or carry the Cauſe, for the Purſuer or Defender, according as the Point ſhall be proven, or ſecumbed in. Whereupon there is an *Act* extracted, deducing the Proceſs, and Points ſuſtained and admitted to Probation, and likewiſe thoſe that are repelled: which doth contain the *Libel*, or *Suſpenſion*, the *Compearance* of the Parties, and the *Production*, and the *Diſpute* of all Parties compearing, and the *Interlocutor* of the Lords. But when all is *inſtantly verified*, or needs no further Probation, there is no *Litisconteſtation*: which is ſometimes in ordinary Actions, and frequently in *Suſpenſions* and *Advocations*, when the Ordinary doth at once, judge the *Relevancy* and *Probation*. But Probation after Litisconteſtation, muſt be adviſed by the whole Lords.

Litis

Litisconteſtation may be againſt the Defender *abſent*, and then the Libel is only admitted to the Purſuer's Probation. Wherein, if he do cautiouſly libel, he will libel that which may take off the Objections, competent in Law, againſt his Titles: as if they be *holograph*, or ancient and paſt Preſcription; that they are preſerved by *Minoritie*, or *Interruption*, particularly libelling and proving the ſame. Otherwiſe the Lords may ſtick to give him Sentence: or if by inadvertency they do, the Sentence will be eaſily ſuſpended, or reduced, unleſs ſupplied as aforeſaid. And therefore if the Defender appear not, the Purſuer will call for the Libel, and inſert what is neceſſary to make it effectuall, and make *Litisconteſtation*, and *Probation* accordingly.

When Litisconteſtation is made *parte comparente*, ſometimes the whole Objections and Defenſes of the Defender are repelled, and the Summons is found *relevant*, and admitted to the Purſuer's *Probation*. Sometimes the Defender's peremptory Exceptions, one or more, are found *relevant*, and admitted to his *Probation*: which when they do import the verity of the *Libel*, the Purſuer is liberat from Probation thereof. Otherwiſe the Defender propones his Defenſes, *denying the Libel*, or *denying the Quantities* and *Prices* libelled. In which caſe, by the Act of Litisconteſtation the Purſuer is ordained to prove his *Libel*, and the Defender his *Exceptions*. For inſtance, if the Purſuit be for Payment of a Debt, if the Defender propone his Defenſe upon a *general Diſcharge*, not relative to any particular Debt, or if he do propone *Compenſation*; he doth not acknowledge the Truth of the Libel, and ſo he may deny the ſame: and if he prove either of his Defenſes, or the Purſuer fail in proving the Libel, the Defender will be aſſolzied. But if the Defender propone an Exception of *Payment*, it doth *acknowledge*, that the Debt was *due*: and therefore the Purſuer needs not prove his *Libel*, but the Defender is to prove his Defenſe; wherein if he ſuccumbe, the Purſuer will prevail, without further Probation.

In like manner, in a Purſuit of *Spuilzie*, if the Defender except upon *lawful Poynding*, he doth acknowledge the Libel, as to intromiſſion with the particulars in his *Exception*; but he may deny the *reſt*, or he may deny the *Prices* libelled, which therefore the Purſuer muſt prove. But if the Defender omit to proteſt, That he *acknowledges not the Quantities and Prices*, the Purſuer will not be put to the proving thereof: but the Defenſe will be holden as affirming the Libel. And if the Defender ſuccumbe, he will not be heard to quarrel the Prices or Quantities libelled, for want of Probation thereof.

As the *Exception* doth ſometimes acknowledge the Libel, and ſometimes not; ſo doth the *Reply* ſometimes acknowledge, or not acknowledge the Exception, as to the *Quantities* or *Prices*; and the Proponer will yet be put to the proving thereof. And the *Duply* is in the ſame caſe, as to the *Reply*, *&c.* So that ſometimes the Purſuer will have to prove his *Libel* and *Reply*, and the Defender his *Defenſe* and *Duply*. For inſtance, in a Purſuit for Debt due by Bond, if the Defender except upon *Compenſation*, and the Purſuer reply upon a *Diſcharge* of the Debt compenſed on, and the Defender alledge, That he hath right to the Sum (wherewith he would compenſe,) as *Aſſigney*, and if any ſuch Diſcharge was, it was poſterior to his *Intimation*; there the *Libel*, *Exception*, *Reply*, and *Duply*, muſt all be proven. And if the Purſuer ſuccumbe in proving his Libel, whatſoever be done in the reſt, the Defender is aſſolzied. If the Purſuer prove the *Libel*, and the Defender ſuccumbe in proving his *Exception*; albeit the Purſuer faill to prove the *Reply*, he carries the Cauſe. If the Purſuer prove the *Libel* and *Reply*, and the Defender prove not both the *Defenſe* and *Duply*, the Defender will be decerned.

In diſcuſſing of Proceſſes before *Litiſconteſtation*, the Ordinary hears the Advocats on both ſides debate, and if the Point be *clear*, according to Law and Cuſtom, he decides. But if it be *dubious* or *new*, then he adviſeth with the Lords. If he decide, the terms he uſeth are, *Suſtains the Order*, or the *Title*, or *Libel:* or otherwiſe, *Suſtains the Alledgences* againſt the ſame. And if the Libel be *irrelevant*, or the Title *inſufficient*, he *aſſolzies ſimpliciter*, or *ut libellatur*. If he ſuſtain the Libel, and proceed to the Defenſe, and find the ſame relevant; the terms are, *Suſtains the Defenſe*, or otherwiſe *Repells the Defenſe*. And if he find the Reply relevant, and preſuppoſing the Defenſe; then he *repells the Defenſe in reſpect of the Reply*. And if the Defenſe did alſo acknowledge the Libel, he *aſſigns a Term* to the Purſuer to prove the *Reply*, and not the *Libel*. Or otherwiſe, he *aſſigns a Term to prove the Libel and Reply*. Or if the Reply be elided by a Duply, preſuppoſing the truth of the Reply, (as the former Points did of the preceeding,) then he *aſſigns* only *a Term to the Defender to prove the Defenſe and Duply:* and ſoforth of the reſt. And if he reſolve to adviſe with the Lords, his term is, *you ſhall have the Lords Anſwer*: which he will ſeldom refuſe, if the matter be doubtful; eſpecially if the Defender offer a Daller to be forefault, as an *Amande*, if his Alledgence be not ſuſtained.

Before an Interlocutor be reported, the Proceſs is brought to the Ordinary, who peruſeth the ſame, and prepares it for the Lords. And either Party give their *Informations* to the Lords containing the deduction and favour of the Cauſe, and the Diſpute, which they may inlarge by reaſons in their Informations as much as they pleaſe: but may alledge no matter of *Fact*, by way of *Defenſe* or *Reply*, but what was proponed at the Bar.

The Ordinary doth the next Day, or ſoon after, relate the Cauſe, and repete the Diſpute to the Lords. And if he find any matter of *Fact* in the Parties Informations, which was not proponed at the Bar, he either hears them again upon it, or he reports and ſhows to the Lords, that it was not proponed. And if they find any thing weighty therein, they will deſire him to hear the Parties upon it, either before Interlocutor, or after, as they ſee cauſe. Upon report of the Diſpute, the Points that any of the Lords think material, are ſtated and ordered, and any of the Lords reaſon thereanent. And if they be not unanimous, the Points whereupon they differ, go to the Vote. And then the Ordinary cauſeth call the Parties in the *Outer-houſe*, and reports the *Interlocutor*, (which is minuted by the principal Clerk,) and declares what the Lords ſuſtain or repel. And immediatly after, ordains the Defender to inſiſt in his further *Defenſes*, or the Purſuer in his *Replys*: and ſo proceeds from Day to Day, to new Interlocutors, until the Cauſe be fully diſcuſs'd, either by *Decreet*, or *Proteſtation*, or *Litiſconteſtation*. And if either Party have omitted any thing, upon their application to him, before the Sentence or Act be extracted, while he ſits without, he will hear them. And thereafter, if by *Bill* they repreſent any new matter of moment, the ſame of courſe is appointed to come to the Ordinary, and he will hear them thereupon. And if he refuſe them, the Lords upon hearing of the Bill, if they find cauſe, will ordain the Ordinary, or ſome other, to hear it. Each Ordinary doth alſo order the extending of Acts, whereof either Party gets a *Scroll* before they be extracted. And if they differ, the Ordinary determines the ſame according to the *Minuts*, and meaning of the Lords. In all which hardly can any Party get hurt, but by their own negligence, or the fault of the Clerks, who if they extract any thing unwarrantably, the Lords will mend the ſame, even after it is extracted.

In

In diſcuſſing of Proceſſes, it is ordinary for Parties not called, *to compear for their intereſt:* but they will not be heard, till their *Intereſt* be produced; and then they will be heard in the ſame manner, as if they had been Parties in the Cauſe. There ariſeth oftimes upon this occaſion, the competition of many Rights, which are mutually interchanged, and every one of the Parties admitted for their intereſt, muſt ſee the *Productions* of all the reſt. In which caſe, the Lords do frequently ordain all Parties, to produce ſuch Writs as they will make uſe of in the Cauſe, with Certification that they ſhall not be heard to produce any thereafter: which nevertheleſs extends only to ſuch Writs as they then have in their power. And then the principal Cauſe proceeds, and is either referred to ſome of the Lords to be heard in the afternoon: or otherwiſe, the Ordinary ſees and compares the *Productions* of the Parties, and at the calling of the Cauſe, he declares what he finds evident and clear, as to the *Preference.* And then ordereth the Parties to diſpute, allowing the *ſecond* Right to be firſt diſpute, with that which he finds *preferable*; and which of them prevails, the reſt in order, to compete therewith untill all be diſcuſſed, and *one only* be preferred: or otherwiſe, ſome of them *jointly*, or ſome of them *primo loco*, and others *ſecundo loco*, &c.

Competition of Rights, doth alſo come in by *Double Poinding:* and that either by way of *Suſpenſion*, or *Action*; whereby the ſeveral Parties are cited to produce their Rights, and to hear and ſee, it found and declared, who hath the *beſt Right*; that thereby the Parties liable, may be out of hazard.

The *Action* of Double Poinding, proceeds on a ſimple Summons, on ſix dayes. The *Suſpenſion* is like other Suſpenſions, but that it ſuſpends the Right of all Parties till it be diſcuſſed.

This is the ordinary way of diſcuſſing of Proceſſes, by premitting the Point of *Juſtic* or *Relevancy*, and then admitting the Point of *Verity* to Probation, according to what is found juſt: and not till it be found juſt, for *fruſtra probatur quod probatum non relevat.* In the Probation, the benefit or burthen thereof is ordinarly aſſigned to *one Party*, without *joint Probation.* Whereupon ariſeth the frequent Debate, Who ſhall be preferred in Probation: eſpecially where the Alledgences are contrary. As if one offer to prove *violently ſpuilzied* and taken away by *force*, the other Party alledgeth *voluntarly delivered* and taken away by *conſent*; the queſtion will be, Who ſhall be preferred in Probation? wherein the common Rule is, That where the Defenſe is contrary to the Libel, he that is *in libello* is preferred. But even there, and in all Caſes, the moſt *ſpecial* and *pregnant* Probation is preferred. As in *Spuilzies*, the Purſuer libels *violence*, the Defender offers to prove *lawfully poinded*, which is contrary; yet being to be proven by Writ, (*viz.* by the *Executions* of the *Poinding*) the Defender is preferred. Thereafter, the Parties are ordained particularly to condeſcend on the *Circumſtances*, and ſometimes on the *Witneſſes Names*, that the moſt *ſpecial* Condeſcendence, and the moſt *unſuſpect* Witneſſes may be preferred.

But in ſeveral Caſes the Lords premit the *Probation* to the Diſcuſſing of the *Relevancy*: and therefore, *before Anſwer*, ordain Witneſſes *ex officio* to be adduced. And where they ſee it dubious, who ought to be preferred in Probation, they uſe *before Anſwer* to the Diſpute; to ordain Witneſſes to be examined *hinc inde*, and ſuch Writs and Evidents to be adduced, as either Party will make uſe of. And then they adviſe the *Relevancy* and *Probation* together:

and muſt not admit new Probation or new Alledgences in *Fact*, competent before the Act; but the *Act before Anſwer* ſtands, as an Act of *Litiſconteſtation*, in all Points, and hath the ſame Terms to prove, with *Litiſconteſtation*.

In Acts of *Litiſconteſtation*, not only the Points to be proven are determined, but alſo the manner of Probation: which is either by *Preſumption*, *Writ*, *Oath of Party*, or *Witneſſes*. Preſumptions are not put to probation in the future, but are cognoſced in the very Act, and inſtantly verified; though from the Probation it ſelf, Preſumption may ariſe. And therefore the manner of Probation is ordinarly appropriat to *Writ*, *Witneſſes*, and *Oath of Party*, and that which is *preſumed*, is ſaid to need no Probation.

Preſumptions are of three ſorts, either *juris & de jure*, or *juris*, or *judicis*. *Præſumptio juris & de jure*, is that which the Law determineth and preſumeth upon the Point of Right: which is ſo ſtrong, that it is a full Proof, and admits no *contrary Probation*. Unto which is reduced *fictio juris*, that which the Law, for utilities ſake, preſuppoſeth to *be*, and holdeth to be *true*, though it be not. So the Heir is preſumed to be *one Perſon* with his *Predeceſſor*, and the *Defunct's Poſſeſſion* is eſteemed the *Heir's Poſſeſſion*, whereby whatever was poſſeſſed by the Defunct, if it was not effectually tranſmitted, is repute as poſſeſt by the Heir, though he exerciſe no *poſſeſſory* act either of body or mind thereanent. Moſt of our *Certifications* are founded upon ſuch Preſumptions: as a Writ is improven *for not production*, upon this Preſumption, that the Defender keepeth it up, becauſe he knows it is *forged*; and therefore it is *declared* to be forged. Which Preſumption doth not admit contrary Probation. So a Partie's being holden *as confeſs'd* is founded upon the Preſumption, that by his *Oath*, he could not deny the *truth* of what is alledged. So the *uſing* of *falſe Writs proprio nomine*, without Proteſtation, expreſſing *the way how the Uſers came by them*, is a Preſumption of their being *acceſſory* to the *Forgery*.

Præſumptio juris, is when the Preſumption is acknowledged in *Law*, but *admitteth contrary Probation*. So Diſpoſitions of *Moveables*, *Tacks*, &c. made to a Rebell's *Bairns*, *Friends*, or *Servants*, are preſumed by Act of Parliament to be *fraudulent*, and to the behoof of the Rebel: yet ſo as the contrary may be proven, if any equivalent Cauſe be inſtructed. In like manner *Diſpoſitions* of *Lands*, *&c.* made by Perſons Bankrupt, or *inſolvent*, are preſumed by *Act* of *Par.* to be fraudulent, and in prejudice of Creditors, without an equivalent onerous cauſe. And albeit in themſelves, they bear expreſly an *onerous cauſe*, either *generally*, or *particularly* for Sums of Mony, or Deeds done; yet when granted in favour of *conjunct* and *confident Perſons*, they are preſumed to be without *a true* onerous cauſe, and the Rights themſelves, bearing the ſame, are not truſted: albeit the *contrary* may be proven, by inſtructing the onerous cauſe, for which they were granted.

Præſumptio judicis, called alſo *præſumptio hominis*, is that Preſumption which is not expreſly in *Law*, but the juſt Deduction or Conſequence, admitted by the Judge. This Preſumption doth more eaſily admit contrary Probation: and therefore ſuch Preſumptions are ſaid, to transfer the *onus probandi*; that is to ſay, they prove ſufficiently for the Adducer, unleſs the contrary be proven, in which caſe, *preſumptio cedit veritati*, in compariſon whereof it is ſaid to be but *veri ſimilitudo*, *veriſimilis veritas*, or *conjectura*. And yet it is not neceſſary, that either of the two Alledgences of the Parties muſt be *true*; but that which ought to be, is *preſumed*, albeit it be not *certain*: according to the Maxime of Law, *quod ineſſe debet*, *ineſſe preſumitur*.

In

In all Summons and Acts, as there is a *Will*, or *Command* of the Judge; ſo there ought to be a *Certification*, certifying what the Judge will do, if his Command be not obeyed, as the ſting in all Proceſſes, without which they would be long of coming to an Iſſue. For if nothing could be done, but the *charging, denouncing*, and *incarceration* of the Party, (if he were found,) until he gave *Obedience*, or declaring him *Fugitive*, or denouncing him *Rebel*, or Outlaw for his Contumacy; little benefit would thence ariſe to the other Party, and the contumacious Party might long ſtand out. And therefore more expedite Certifications are invented, of which we have as many, as appoſite, and as effectual as any Nation whatſoever. Of which we ſhall adduce the prime inſtances.

The firſt and moſt general *Certification* is, That the Lords will proceed *to do Juſtice*. Whereupon when Defenders appear not, they do proceed to *Litiſconteſtation*, and do admit Probation, and give Sentence, as if the Defender did appear.

The *Romans* had no ſuch Certification, and therefore unleſs the Defender were compearing *willingly*, or by *compulſion*, they could do nothing, but (in ſome Caſes) put the Purſuer in Poſſeſſion.

Neither can the *Engliſh* give any Sentence againſt a Partie abſent: but if he compear not, they do no more, but give out an *Outlawry* againſt him, declaring that ſince he will not obey Law, he ſhall not have the benefit of Law, in any Caſe. As Judges in *Criminal* Cauſes in *Scotland* commonly do, if the Defender compear not, they declare them *Fugitive*, which is *Out-law:* whereby his Eſcheat falls. But our Civil Certification is more equal and appoſite: ſeing thereby the Lords in contumacious Defenders *abſence*, do the ſame that they would if they were *preſent*.

The *next* general Certification is, either in Summons or Acts, againſt Parties cited to give their Oaths, with expreſs certification, That if they compear not and depone, they ſhall be holden *as confeſs'd:* that is, as if they compeared and confeſſed that which is alledged againſt them. Which is a moſt *uſual* Certification, and concludes more Proceſſes than all the other. It is alſo very *important*, and will be hardly reſcinded: and therefore it is not ſuſtained, unleſs it be particularly expreſſed, and unleſs the Party be cited by a *Meſſenger of Arms*, and be *perſonally apprehended*, that ſo his *contumacy* may be palpable.

The *third* ordinary Certification is, againſt Parties (who have intented any Proceſs,) to *inſiſt*, with Certification, That if they inſiſt not they ſhall never be heard *thereafter*. Which is of great uſe; for thereby Defenders put themſelves to *certainty*, and are not obliged ſtill to attend the motion of the Purſuer, who may readily wait his opportunity of the *infancy*, or *evil condition* of the Defenders Heir, and inſiſt againſt him when he is leaſt able to defend himſelf; and letting the Proceſs ſleep, may ſo continue it, were it never ſo long. In oppoſition whereof, either this Certification, or a Declarator of Right may be intented by the Defender, to determine the Cauſe, whilſt he finds himſelf in a capacity.

There is another Certification in the caſe, when the Lords by hearing any Debate, do *before anſwer*, ordain the Writs by which either Party will prove what they have alledged, to be produced; with certification, That they ſhall not be heard *thereupon* thereafter: and that their Al-

ledgence ſhall be holden as *not proponed*. And more generally, at the entry of ſeveral Cauſes, eſpecially in the Competition of many Parties, and many Rights, the Lords ordain all the Parties to produce ſuch Writs as they have in the Cauſe, with certification, That they ſhall not be heard thereafter. But in regard the Terms of Production are not granted ſo frequently, and ſo large as in other Caſes; the Lords do extend the Certification no further, than as to ſuch Writs as the Parties have in their hands, the time of the Certification. Whereupon they do ſometimes ordain the Parties to depone, and if not, if any Party produce and alledge upon a Writ, not produced before the Certification was admitted; if the Certification be alledged againſt the ſame, it will be rejected. But if the Producer offer to make faith, he had it not the time of the Certification, it will be admitted.

Sometimes no particular Certification will be expreſt, but the Act bear, *With Certification*, &c. And the effect thereof is, that the Lords do admit thereupon ſuch Certification as is juſt, and ordinary in ſuch Caſes. But if there be no ordinary Certification in ſuch Caſes, the Act is ineffectual. As alſo other Acts wherein, through negligence, no Certification is expreſt; unleſs the fulfilling the Deſire of the Act concern the Purſuer. In which caſe he will get no Proceſs, till he fulfil the ſame: which is equivalent to Certification.

Inſtead of Certification, the Law ſometimes allows *Proteſtation*: which differeth from Certification in this, that the Certification which is expreſt in the Summons, or Act, beſides that which is not ordinary nor proper to be ſo inſert, is ſometimes admitted by way of Proteſtation. And albeit it be free for every Party to proteſt for what he pleaſeth, yet only a few Proteſtations uſe to be admitted; ſuch as Proteſtations at the inſtance of Defenders, upon the *ſhort Copies* of Suſpenſions or Summons: wherein albeit there be no Certification, That if the Purſuer compear not to inſiſt the Defender ſhall be freed from the Inſtance; yet the Defender's Proteſtation, as being juſt and ordinary, is inſtantly admitted, as effectually as if there had been a Certification in the Summons, That if the Purſuer did not inſiſt, he ſhould fall from that Inſtance.

Such is the Proteſtation lately introduced in favour of the Purſuer, whereby upon the *large Copy* of the Summons, if the Defender refuſe to produce the Proceſs, the Purſuer proteſts, That the Copy may be holden as a *Principal*, and that the ſame may be holden as *inſtructed*, and *proven*, and Decreet pronounced. Which Proteſtation the Lords admit, in reſpect of *the Contumacy* of the Defender's Advocate, who refuſeth to produce the Purſuer's Proceſs.

Such alſo is the Proteſtation of the Purſuer after Probation, at the Concluſion of the Cauſe, whereby when the Defender has produced his Writs, or Witneſſes, conform to the Act of *Litisconteſtation*, he proteſts, That he may be admitted *to produce no more*, and that *the Cauſe may be holden as concluded*: which Proteſtation the Ordinary admitteth, whereby the Cauſe is concluded; and neither Party can uſe further Probation regularly. So the Lords will adviſe whether the Points whereupon *Litiſconteſtation* was made, be proven, or not proven.

In other Caſes either Party may proteſt what they pleaſe: but their Proteſtation receives no preſent Anſwer. The greateſt uſe it hath is, that it be not preſumed thoſe who proteſt, do acquieſce by their *ſilence*: *nam qui ſilet conſentire videtur*. And therefore when one of the Parties makes any ſuch Proteſtation, the other Party uſeth ordinarly to proteſt *in the contrary*: and there is no Anſwer given to either of their Proteſtations: but they uſe to be inſert, unleſs they be clearly contrary to Law; in which caſe they will not be ſuffered to be inſert. As if the Parties ſhould proteſt, at the Sentence of the

Lords,

Lords, *for remede of Law*, or ſhould proteſt, That the Lords *ſhould not proceed*; theſe, being againſt their *ſupreme Juriſdiction*, will not be inſert: but other Proteſtations will. As if any Reaſon of Suſpenſion be repelled, as *incompetent* in a *Suſpenſion*; the Suſpender may proteſt, The ſame may be without prejudice to him to uſe *Reduction*. Or if any Defenſe be repelled, as *incompetent* in the *firſt Inſtance*; the Defenders may proteſt, That it be without prejudice to them, to make uſe thereof in the *ſecond Inſtance*, by *Suſpenſion*, or *Reduction*. Or if any Right be reduced, or redeemed; the Defenders may proteſt, That it be without prejudice to them of any *other* Right, whereby they may brook the Lands, or thing in controverſy. Which, is eſpecially done when the Lords do not expreſs in the Sentence ſuch Reſervations, as oftimes they do; and though they be omitted they are implyed in the nature of the thing. But leaſt the *ſilence* of the Parties might import, they pretend no further, they may for their further ſecurity proteſt.

Proteſtations are only competent, where Certifications, Defenſes, Replys, or Duply's are not competent. And therefore Proteſtations upon *Copies* as aforeſaid, and at the *Concluſion of the Cauſe*, and upon *incompetency* of *Defenſes*, *Replys*, *Duplys*, &c. are only competent. For if theſe other were competent, Proteſtations were neither *proper*, nor effectual. As if when the Defender's *Defenſes*, or ſome of his *Reaſons* of *Suſpenſion* are diſcuſs'd; if Proteſtation were made, That the Defender might be heard upon other Defenſes, or upon the Reaſons not diſcuſſed; this Proteſtation, albeit inſert, would be of no effect, becauſe contrary to Law, which obliges all Parties to propone all the Defenſes and Reaſons, that they have, before *Litiſconteſtation*. And therefore in the ſecond Inſtance, *new* ones are repelled, as *competent* and *omitted*. So that to proteſt for liberty to *omit*, or *add* in a poſterior Inſtance, is againſt Law: and thoſe Alledgences being competent in the firſt Inſtance, ought to be *proponed*, not *proteſted for*.

Proceſſes come in before the Lords in the *ſecond Inſtance*, by *Advocation* or *Suſpenſion*: and both in the *firſt* and *ſecond* Inſtance by *Reduction*. For Reductions of *Decreets* or *Acts* are in the ſecond Inſtance: but Reductions of *Rights*, whereupon no Decreet or Sentence hath followed, are in the firſt inſtance. Of theſe therefore in order.

The original of Advocations is this. Of old, Parties were allowed to *appeal* from *inferior*, to *ſuperior* Courts, when they conceived themſelves to have gotten wrong, which was called *Falſing of Dooms*. And ſo there lay an Appeal from *Barons* to *Sheriffs*, and from Sheriffs to the Kings *ordinary Council*, in whoſe place the *Colledge of Juſtice* ſucceeded, and the Senators of which are therefore deſigned Lords of *Council and Seſſion*, from whom there is no Appeal to *King* or *Parliament*. By theſe Appeals, Proceſſes did ſtop, till the Appeals were determined or deſerted. And the Superior Court to which the Appeal was made, did firſt determine the Appeal, whether *bene vel malè appellatum*. The Cauſe was *remitted* to the Judge appeall'd from, unleſs the Appeal were ſuſtained; in which caſe the Judge appeall'd unto, *proceeded* in the principal Cauſe: as is yet accuſtomed in moſt Nations. But Appeals have been of a long time excluded in this Kingdom in any Caſe, and a far better Remedy introduced in their place, by *Advocation*. For by Appeals Proceſſes were ſtopt, at the option and fancy of private Parties, which could not but increaſe animoſity and clamour.

Advocations proceed upon Supplication to the Lords, containing the ſpecial Reaſons for which the inferior Judge is *incompetent*, *unequal* or *unjuſt*: and concluding that therefore the Cauſe ought to be *advocat*, or called from him, and determined by the Lords, or other competent and unſuſpect Judges. Which Supplications do not paſs of courſe, but are ſpecially adviſed by the Ordinary upon the Bills, who conſiders not only the *Relevancy* of the Reaſons of Advocation, but the *Inſtructions* thereof. For ſeing the Party complaining, hath another Remedy, by *Suſpenſion*, and *Reduction*; Advocation is not to be granted, unleſs the Reaſons be not only relevant, but inſtructed. In which the Teſtificates of known Perſons of Reputation, will be ſufficient to obtain Advocation, though not to determine the Cauſe. As if the Defender alledge, That he is not within the *Juriſdiction*, or that the Judge is of ſuch *relation* to the other Party, or that there is open *enimity* betwixt them: and in all Caſes of difficulty, the Ordinary adviſeth with the Lords. And if any Party appear, he will get a ſight of the Bill of Advocation, and be heard thereupon: and oftimes the Lords will warrant the *Reaſons* of Advocation to be *diſcuſs'd upon the Bill*, and ſometimes the *principal* Cauſe.

The Lords do ſometimes prohibite any Advocation to *paſs*, but *in preſentia*, during the ſitting of the *Seſſion*, or by *three Lords* met together in *Vacance*, eſpecially near the cloſe of the Seſſion: that Juſtice be not delayed, or the inferior Judge diſcouraged, or prejudged.

The ſame Reaſons, that were of old for Appeals, are now for Advocations. As *firſt*, That the Cauſe belongs not to the inferior Court's Juriſdiction: as when Cauſes are advocat from Commiſſaries, as not being *conſiſtorial*; or when any inferior Court is proceeding to determine *Declarators* of *Property*, or other *important Rights*, or the *Competitions* or *Nullities* thereof. *Secondly*, When the Complainer is not within that Judge's *Juriſdiction*, but hath his Domicile and Reſidence elſewhere. *Thirdly*, When the Complainer is *exempted* from that Judge's Juriſdiction, or hath the *priviledge* of Advocation by Office, (as the members of the Colledge of Juſtice have by Statute, becauſe of their attendence on the Seſſion.) And ſometimes upon groſs *Inequality* and *Injuſtice*, Exemptions are granted to the Perſons injured, not to be conveenable before that Judge. *Fourthly*, If the Judge be nearly *related* to the other Party: whereof the *Degree* is not determined, but in *arbitrio judicis*. It is certain if he be *Father*, or *Brother* to the Party, he may be *declined*: and if he repell the *Declinator*, Advocation will be granted, both upon *Incompetency* and *Iniquity*. For by Act of Parliament, the Lords are declined, if they be of any of thoſe Relations to the other Party. *Fifthly*, If the Judge be a *Party*, or have any *intereſt* in the *Cauſe*. *Sixthly*, If he have ſhowen any *malice*, or *enmity* againſt the Complainer. *Seventhly*, If he have committed any *Iniquity*, by *repelling* any relevant or competent Alledgence, or *ſuſtaining* that which is irrelevant, or incompetent, againſt the Complainer.

Theſe, or like Reaſons of Advocation, being found relevant, and inſtructed; Letters of Advocation are paſſ'd under the Signet, commanding the inferior Judge to proceed no further, but to ſend the Proceſs and all that hath been done therein, to the Lords: for which a Term is aſſigned. Which being paſt, the Purſuer of the principal Cauſe, and Defender in the Advocation, gives in to the Clerk a ſhort Copy of the Advocation, and craves *Proteſtation and Remit*: which is admitted of courſe by the Clerk, if none compear to pro-

duce

duce the Advocation. But if any appear, ſome Dayes after are aſſigned to him to produce, which is marked by the Clerk upon the *Copy:* and being again called, with *certification*, That if he do not then produce, Proteſtation will be admitted, and the Cauſe remitted to the inferior Judge; at that time, if he produce not, Proteſtation will be admitted.

If the principal Advocation be produced, the ſame is given up to the Defender: againſt whom, if he do not return it within *four Dayes*, together with the Clame before the inferior Judge, Proteſtation is admitted. But if he return it, the ſame is inrolled in the *Roll of Advocations*, according to the Date of the *Return*. And when it comes to be called by the Ordinary, the Purſuer of the principal Cauſe produces his Clame, with the Copy of the Advocation, which was returned; and craves *Proteſtation, and Remit:* which (if the Raiſer of the *A*dvocation do not compear, or inſiſt not in his Advocation) is accordingly granted.

But if the Raiſer of the *A*dvocation compear, and inſiſt, the *A*dvocate for the Purſuer of the *P*rincipal Cauſe, doth briefly relate the Cauſe, and before what inferior Court it was purſued, and craves it to be *remitted:* and the *A*dvocate for the Raiſer of the *A*dvocation, repetes his Reaſons of *A*dvocation, for which he alledgeth the Cauſe ought to be *advocat* to the Lords; which ſtand mainly in the *P*oints before adduced.

The *Reaſon* of *A*dvocation, upon *Incompetency* of the Judge, is moſt ordinary: and that either in regard of a *perſonal P*riviledge of the *P*arty conveened, as in the caſe of the Members of the Colledge of Juſtice, who by *Act* of *P*arliament have the priviledge, that they may advocat their Cauſes from any inferior Court, to the Lords; or in regard of the *matter:* ſo no inferior Judge is competent to diſcuſs the *Nullities* of any Right, neither are they competent to *Declarators of Eſcheat*, and ſeveral other *A*ctions. The Reaſon of Incompetency may alſo be founded upon the *P*arties not being within the *Juriſdiction.*

*A*ll theſe Reaſons of Incompetency are elided, by the *P*artie's compearing and *proponing* any *Defenſe*, except it were a *Declinator.* For by proponing any other Defenſe, he acknowledges and homologates the *A*uthority of the Judge: and therefore cannot queſtion the ſame, upon the point of *Incompetency.*

But if the Incompetency ariſe upon the matter in queſtion, which did not not appear at firſt, but appeared thereafter, upon the Debate of the *P*arties; as if the Cauſe dipped upon the *diſcuſſing* and *competition* of different heritable Rights; or if there ariſe a Debate upon the *Nullity* of any Right: in theſe Caſes, compearance, and acknowledgement of the *A*uctority, will not exclude the Reaſon of *A*dvocation.

The *Reaſon* of *A*dvocation upon *ſuſpition* of the Judge, as too much intereſſed in the one *P*arty, or too much unfriend to the other; ſtands much in the arbitrement of the Lords: the preciſe Degree of Conſanguinity or *A*ffinity, or the acts of Enmity, not being determinat in Law. *A*nd it is the ſame in the caſe where there are more Judges, and the Reaſon meets but with ſome of them: or only with the Deputes, or ſome of them, or only with the Clerk.

When the Reaſons of Advocation are dubious, ſometimes the Purſuer of the principal Cauſe, and ſometimes the Ordinary, will offer to the Raiſer of the Advocation, *to advocat of Conſent*; provided the Purſuer of the principal Cauſe, will diſpute the Cauſe *inſtantly*, or otherwiſe will diſpute the ſame without further ſight of the principal Proceſs, or extracting an *Act of Advocation*. For when otherwiſe the Parties advocat of Conſent, they are to do it when the Clerk calls: and there muſt be an Act extracted upon the Conſent.

If the Cauſe be advocat upon the Relevancy of the Reaſons, the ſame muſt be inſtantly inſtructed: and if they conſiſt *in facto*, as the *Reſidence* of the Party, the *Affinity* or *Enmity* of the Judge; the Raiſer of the Advocation ought either to have Witneſſes inſtantly ready to prove, or at leaſt Teſtificaets of Perſons above exception, and known to the Lords. For there the queſtion is not, for deciding of the principal Cauſe.

Advocations are hardly ſuſtained, after *Litiſconteſtation* before inferior Courts, unleſs it be upon the Reaſon of *Iniquity*, which is alwayes ſuſtainable, and doth ſometimes with one breath, determine both the Advocation and principal Cauſe.

The Cauſe being advocat, either of Conſent, or by Authority of the Judge, the principal Cauſe advocat, being ſeen by the Raiſer of the Advocation, (thereby become Defender of the Cauſe) together with the Act of Advocation extracted; then it comes in as an ordinary Cauſe, in the firſt Inſtance. But the Defender will be reponed, and heard upon any Defenſe, which was unjuſtly repelled to him, by the inferior Court, and upon any other he pleaſeth: becauſe one being unjuſtly repelled, he was not obliged to propone any further.

The order in diſcuſſing of *Suſpenſions* is thus. The Charger againſt whom the Suſpenſion is obtained, after the Day of compearance in the Suſpenſion is paſt, gives a ſhort *Copy* of the Suſpenſion to a Clerk, and cauſeth call it in the Outer-Houſe. If none compear for the Suſpender, *Proteſtation* is admitted of courſe.

If an Advocate compear for the Suſpender, then the Clerk aſſigns a ſhort Day to him to produce the principal Suſpenſion: and at that ſame time the Charger may give him out the Charge, being the Decreet, or Sentence, obtained. The firſt Diet being come, the Clerk calls the Copy again, and aſſigns a ſecond ſhorter Time, with certification, That if he produce not, Proteſtation will be admitted. And then calls the third time, and if the principal Suſpenſion be not produced, with the Charge (if it was given out in time) Proteſtation is admitted. All which is marked by the Clerk, on the back of the Copy, and being put in the *Minut-Book* and read, it may be extracted the next Day. But during that time, the production of the *Principal*, with the *Charge* to the Party, Clerk, or Keeper of the *Minut-Book*, will ſtop the Proteſtation. The which order is alſo uſed for *getting back* of Advocations, and *ſeing* the *principal Cauſe*, if it be given out when the Copy is firſt called.

The Charger's Advocate, at the giving out of the Charge, writeth on the back thereof, the *Day* that it was *given out*, and ſets his name thereto: and is not obliged to receive the Suſpenſion, unleſs the Suſpender mark on the Proceſs

ceſs, That he hath *ſeen and returned* the ſame; but may take out his Proteſtation, as if the Principal were not produced.

According to the Date, of the Return of the Charge, the Suſpenſion is *inrolled*: and when it comes to be diſcuſſed, the Cauſe being called, the Charger produceth the Copy marked by the Clerk, as aforeſaid, and thereupon *craveth a Proteſtation* from the Ordinary, which he obtains, if the Suſpender's Advocate produce not. Yet ſometimes, the Charger's Advocate will hold the *Copy* for a *principal*, and the Suſpender will repete his *Reaſons of Suſpenſion*: which though they be not admittable upon a ſhort Copy, in ſtrict form, (becauſe all Reaſons of Suſpenſion, both *principal* and *eked*, ought to be ſet down in *Writ*, and given to the Charger to *ſee*;) yet frequently, the Charger will rather diſpute the Cauſe, than take a Proteſtation, which is eaſily ſuſpended again: and therefore will anſwer to the Reaſons, as verbally repeted.

But if the Suſpender compear, and the Charger do not inſiſt, he may produce the principal Suſpenſion, and *crave the Letters to be ſuſpended ay and while the Charge be produced*: which puts him *in tuto*, that no Proteſtation can be taken upon the Copy, till the Charge be produced. Yea, if the Suſpender extract and produce the Charge, and refer his Reaſons to the Lords; they will adviſe the ſame: and if they find the Reaſons relevant, and proven, will ſuſpend the Letters *ſimpliciter*. In which caſe, the Decreet of Suſpenſion is as other Decreets *in abſence*; and may be reduced upon a Summons of Reduction: wherein the Lords will conſider the Reaſons, and hear the Parties debate thereupon; and may recall what they formerly did, albeit *ſuper eiſdem deductis*: which they cannot do in Decreets upon *compearance*. But when the Defender is abſent, the Lords do not ſo accurately conſider the Cauſe, ſeing there is a Remedy: and likewiſe becauſe, albeit they find the Reaſons relevant, as before; the Party may elide the ſame by relevant Anſwers and Duplys.

If the Charger compear, and alſo the Suſpender, and the principal Suſpenſion is produced; then the Charger doth briefly repete his Charge, or Decreet ſuſpended, and declares what he inſiſts in. And if there be any thing *general*, he uſeth to give in a *Condeſcendence* in writ, at the beginning, to be *ſeen* with the Charge; which therefore is called the *ſpecial Charge*. And if the Charge have in it many Members, he declares what Points he inſiſts in *primo loco*: and if he do not, the Suſpender may inſiſt upon any Reaſon of Suſpenſion he pleaſeth, againſt any of the Points.

The Suſpender in repeting his Reaſon, ſhould condeſcend by the *number*, what Reaſon it is; and whether it be *libelled* or *eked*. For Suſpenders may add or eke to their libelled *Reaſons*, if they will. So that if the Reaſon they repete, be neither eked nor libelled, in ſtrict form, it may be repelled: or if the eked Reaſon hath not been at firſt produced, and *ſeen*, with the Suſpenſion, it ought not to be received. Yet many times the Ordinary will indulge that favour, and cauſe the Charger either anſwer it inſtantly, or take it up till a Day, to *ſee*: which he may do, without expunging of the Cauſe out of the *Roll*; but may call the Cauſe again at the Day appointed. And if the Charger hath ſeen the Reaſon, may proceed.

In like manner, Reaſons of Suſpenſion ought to be *inſtantly verified* by *Writ*, unleſs they be referred to the Partie's *Oath*: in which caſe, the Charger's Pro-

curators, to haſten the Proceſs, will take a Day to produce the Charger to give his Oath. But if the Reaſon of Suſpenſion be founded upon a Writ, which is not the Suſpenders own Writ; as when Cautioners ſuſpend upon Diſcharges granted to the principal Debitor: the Suſpender will get a Term *to prove*; as he will, when the Reaſons of Suſpenſion conſiſt *in facto*, and are to be proven by *Witneſſes*.

The firſt point of Debate in Suſpenſions is, upon the *Relevancy*, and *Verification* of the Reaſons. The next point is, upon the *Competency* of the Reaſons. For many Reaſons are competent by way of Reduction, that are not competent by way of Suſpenſion; becauſe Suſpenſion ſtops the Execution of a Decreet already obtained: and therefore the Execution ſhould not be delayed, except upon Reaſons relevant, and a ſhort Probation; but the Execution ought to proceed. And if the Decreet whereupon Execution paſs'd, be reduced; all that hath been taken away by the Execution, will be recovered. So a Reaſon upon *Minority* and *Laſion*, is not receivable by way of Suſpenſion, but by Reduction. Neither a Reaſon upon *Inhibition*, *Interdiction*, *Iniquity*, *Nullity*; or upon any *Clauſe irritant*, not being *declared*; (albeit it bear to take effect *without Declarator*) except in few Caſes.

If the Reaſon of Suſpenſion be ſuſtained, then the Charger propones the *Anſwer* to the Reaſon; which is ſo termed, to difference it from Defenſes proponed in ordinary Actions: becauſe the Reaſon of Suſpenſion is a Defenſe in the principal Cauſe, and the Anſwer is a Reply thereto. The Anſwer being proponed, is firſt debated as to the *Relevancy*, and *Competency* thereof: but it needs not be *inſtantly verified*, becauſe the Charger may delay himſelf. Many things are not *competent* by way of Anſwer, which are *relevant*: as upon *Interdictions*, *Inhibitions*, *Minority*, and moſt *Nullities*, and *Clauſes irritant*, and *Failzies*; which require *Reduction*. But if the Suſpender have a Reduction, and will hold the *Production* thereof *ſatisfied*; he may repete the Reaſons by way of *Anſwer*, if coincident with his Reaſons of Suſpenſion. If the Anſwer be ſuſtained, the Suſpender may propone his *Reply*, which doth not conſiſt in any Alledgence againſt the Relevancy or Competency of the Anſwer; but in ſome diſtinct Writ, Clauſe, or Fact, eliding the Anſwer, in the ſame way as the Anſwer did elide the Reaſon: and ſo the Charger inſiſts in his *Duply*, and the Suſpender may inſiſt in his *Triply*, and the Charger in his *Quadruply*, &c.

Albeit the Suſpender be obliged to verifie his Reaſons of Suſpenſion inſtantly, yet he needs not inſtruct his Reply: becauſe that ariſeth upon the Charger's Anſwer, and he will get a Term to inſtruct the ſame, or his *Quadruply*.

Some Reaſons of Suſpenſion, do not conclude to ſuſpend the Letters *ſimpliciter*, and ſo take away the Decreet ſuſpended *for ever*, but to ſuſpend the ſame for a *time*; and then the Decreet of Suſpenſion bears, *The Lords ſuſpend the Letters ay and while*, &c. Otherwiſe (when the Reaſons conclude ſo, and are ſuſtained) *The Lords ſuſpend the Letters ſimpliciter*.

If in diſcuſſing the Suſpenſion, there be nothing admitted to be proven in the *future*, then the *Decreet of Suſpenſion* follows: which is the common name both of Decreets in favour of Suſpenders, and of Decreets in favour of Chargers, whereby the Lords find the Letters *orderly proceeded*, either *ſimply*,

ſimply, or *ay and while* ſuch a thing be done. And ſometimes the Lords ſuſpend the Letters for a *part*, and find the Letters orderly proceeded for the *reſt*.

If any Point be admitted to be proven, either of the Reaſons of Suſpenſion, Reply, Duply, *&c.* whether it be in favour of on of the Parties only, or of both, when they have different Points to be proven; then *Litisconteſtation* is made, and an Act muſt be extracted, which is an Act of *Litisconteſtation*. But ordinarly in Suſpenſions there is a preſent Decreet.

In all *Reductions* there are ſeveral things different from ordinary Proceſſes: for thereby Decreets, Acts, or other Rights are craved to be reduced or reſcinded either upon *Nullities* therein, or upon Reaſons *in facto*, or *other Rights* eliding the ſame, albeit of themſelves they be not null. So that whatſoever is competent as a reaſon of Suſpenſion, is much more competent as a Reaſon of Reduction: albeit many things be not competent by Suſpenſion, which are competent by Reduction. And therefore when that occurrs, Suſpenders uſe with the Suſpenſion to raiſe a Reduction, that when the Suſpenſion comes to be diſcuſs'd, thoſe things that are not competent by Suſpenſion, may yet be received in the Suſpenſion, becauſe of the Reduction. Eſpecially if the Reduction be *ſeen*, and the Purſuer hold the *production ſatisfied* by the Charge. Then repeting his Reaſon of Suſpenſion and Reduction as *coincident*, he will get the ſame Terms in both. But if he will not hold the production ſatisfied by the Charge, then he muſt debate the Reaſon of Suſpenſion alone: and if they be not found competent, and ſufficiently inſtructed; the Letters will be found *orderly proceeded* in the Suſpenſion, *reſerving the Reduction as accords*. And if the Reduction be ſeen, and be probable to be ſoon ready, and upon relevant Grounds; then the Decreet upon the Suſpenſion will be ſuſpended to be extracted for a time, that in the mean while the Suſpender may inſiſt in his Reduction: which ſometimes is prorogat upon Supplication as the Lords ſee cauſe. And when the Decreet of Suſpenſion is extracted, if there be Reduction depending; the Suſpender doth oftimes obtain a *ſecond* Suſpenſion, that he may conclude his Reduction, but the giving or extracting the ſecond Decreet of Suſpenſion is ſeldom delayed upon a Reduction, which was either not riſed, or not ready, the time of diſcuſſing the firſt Suſpenſion.

In Reductions the *Will* commanding the Defender to be cited, is put in the firſt place; and then the Writs called for to be reduced, in the next: and laſt, the Reaſons of Reduction, (which with the Writs called for, are left blank ordinarly at the raiſing of the Reduction, and filled up afterwards, before it be given out to be *ſeen*) containing ſuch Reaſons as the Purſuer knows, relating in *particular* to the Writs called for, and ſuch other *general* Reaſons as commonly may be alledged againſt any Writ; as wanting *Witneſſes*, or the *Deſignation* of them, or wanting the Deſignation of the *Writer*, or being *vitiat* in the *Date*, or other *Subſtantials*; which are libelled, mainly, to compell the Defender to *produce*: becauſe he is obliged to produce no Writ, but ſuch againſt, which there is a Reaſon libelled. But after the Writs called for are produced, the Purſuer uſeth to cut the Summons, and to libel ſuch Reaſons as he ſees thence emergent: whereupon the Diſpute follows.

But becauſe Certifications upon *Reductions* alone, do only conclude the Writs called for, to be reduced *ay and while they be produced*, which will be ſufficient until the Decreet of Reduction be reduced, and till in the Reduction the Writs reduced, be produced, (for till that time, no uſe can be made thereof, againſt that Right whereupon they were reduced ;) and becauſe the Certification in *Improbations* is far more abſolute, and ſtrong, bearing That the Writs called for *ſhall make no faith in Judgement*, but ſhall be repute as *falſe* and *fenzied*, becauſe they were not produced, therefore in the ſame Libel, *Reduction* and *Improbation* are frequently joyned, whereby all the Writs called for, have a general Reaſon of *Falſhood* libelled againſt them. Which Reaſon of Falſhood may not be eiked in the Reduction, but the Improbation muſt be libelled upon a Bill paſs'd with the concourſe of His *Majeſties* Advocat as in *crimine falſi*.

The calling upon the Copy of Reductions, and obtaining Proteſtations by the Defender, is alike as in other Proceſs. And when the Purſuer compears, if the Defender be abſent, the Clerks calling the Summons of Reduction, do admit Certification of courſe : and if compearance be made, the Reduction with the Titles, Grounds, and Inſtructions thereof, are given out to the Defender's Advocat. And if they be not returned in due time, the Purſuer cauſeth call upon the large Copy, to reproduce the Proceſs, againſt ſuch a *Day*, and then aſſigns another Day, with Certification; and then admits Certification. Which may be extracted within twenty four Hours after it is read in the Minute-Book, unleſs the Proceſs be reproduced. And that Decreet is the ſtrongeſt of any of that kind, becauſe Decreets of Certification in Reductions and Improbations, require no Probation, but are granted upon the *contumacy* of the Defender, who refuſeth to produce. And therefore that Certification is intended to force them to produce, ſince otherwiſe the Right will be *reduced* and *improven*, and be holden as falſe and fenzied.

When *Reductions* are ſeen, returned, and inrolled, at the calling thereof by the Ordinary, the Purſuer's Advocat doth ſhortly relate his Title, and the Writs he calls for to be reduced, and improven *generally*, or *particularly*, and then craves Certification *contra non producta*. The Defender's Advocat may alſo relate the Cauſe, and doth then propone his Defenſes againſt the *Executions*, the Purſuers *Title*, or upon the *Intereſt* of either Party, or alledgeth, That all Parties intereſſed *are not called*, and urgeth the Purſuer particularly to condeſcend on the Writs called for, and debates whether he hath intereſt by his Title produced, to call for them, either for *reducing*, or *improving* of them. Where there ariſeth many important Debates, which being diſcuſs'd, the Defender takes a Term to *produce*, and ſometimes the Term is aſſigned *Reſerving all* the Defenders Defenſes againſt the *Intereſt* of the Party, and the Alledgences againſt the *Production* : which Reſervation continues till all the Terms of Production be run. And when Certification is granted *contra non producta*, if the Defender produce any thing, he will then be heard to diſpute. Why he ought to produce *no further* : and that not only from the Intereſt of the Purſuer, whereby he cannot call for any other Writ than what is produced ; but alſo upon the Ground, That the Defender hath produced *ſufficiently*, to exclude all Rights produced by the Purſuer. In which Caſe the Lords will ſometimes hear the Parties debate their Rights, even before the Production be cloſed : albeit it be more ordinary, and regular, that the Defender ſhould produce what he can upon his hazard, and Certification

fication ſhould be granted againſt the reſt. So that all the Writs whereby the Defender can defend himſelf, being in the field, the Diſpute may be clear, and intire: which otherwiſe may be drawn out into a very long endurance. Seing the Defender, if it be found that he hath not produced ſufficiently, may ſtill drop in one ſingle Writ, and renew the Debate thereupon, and alledge he hath now produced ſufficiently, and make as many Diſputes as he hath ſingle Writs, contrary to the intent of this kind of Proceſs, which is to force Defenders to produce all they have, before they begin to Diſpute. But the Defender will not be heard after the firſt *additional Production*, before Certification: but if what he then produceth, doth unqueſtionably elide the Purſuers Production, he will be aſſolzied. But if the matter remain any wayes dubious, the Lords will rather obſerve the ordinary Form, by concluding the Production firſt, and then falling upon the Reaſons of Reduction.

Before the Act of REGULATION there were *two* Terms allowed in *Reductions* and *four* in *Improbations* for production of the Writs called for. After the *firſt Term* of Production was come, and the *Act* extracted, the Purſuers Advocats cauſed the Clerk call thereupon, *to ſatisfie the deſire of the Act*, and he upon calling it, aſſigned a Day for that purpoſe: and after that called the ſecond time, and aſſigned ſome Diets more, with *Certification*. But he could go no further, till the *Act* was called by the Ordinary, who aſſigned a *ſecond Term*, whereupon a ſecond *Act* was extracted. The Ordinary upon calling the ſecond *Act* in the ſame manner as the firſt, was accuſtomed to aſſign a *third Term*, which being come, and a third *Act* extracted and called as aforeſaid, if the matter were of conſequence, and concerned the Right of many Lands, and that the Defender would take a *fourth Term* to cloſe the *Production* of his own conſent, the Ordinary did give him it: otherwiſe he would grant Certification *contra non producta* conditionally, That what the Defender produced betwixt and ſuch a day ſhould be received. Which favour was only granted leaſt the Parties and Advocats ſhould be ſurpriſed. But ſince the *Act* of *Regulation*, there are only *two Terms* to produce in *Improbations*, and *one* in *Reductions*: which muſt be aſſigned by the Ordinary.

Reductions, unleſs when they are coincident with *Suſpenſions*, are to be diſcuſs'd as to the *Production* in the *Outer-Houſe*: but becauſe of their importance, they are priviledged only to be diſcuſs'd in the *Inner-Houſe*, as to the *Reaſons* of Reduction, unleſs the Lords upon Supplication grant Warrant to the Ordinary to hear and diſcuſs the ſame. And therefore when the *Production* is cloſed, and the *Certification* concluded, either by the Purſers holding the Production *ſatisfied* with what is produced, or by extracting the Certification *contra non producta*; the Cauſe is again called. but the Defender may propone his Defenſes againſt the Production, which were reſerved *in initio litis*, before Certification be extracted, or if he inſiſt not therein, when the Purſuer repetes his Reaſons of Reduction, the Defender will refer the ſame to the Lords. And unleſs there be a Warrant to hear the Cauſe *extra*, the Ordinary will only make a *Great Aviſandum* to both Parties to be ready, to diſpute the Reaſons when the Lords call: and in the mean time, ordain the Defender to ſee his own *Production* in the Clerks hands, as he will be ſerved. But if there be a Warrant to hear the Cauſe, he will give the Defender ſome time to reviſe his own Production in the Clerks hands, and be ready at the next Calling. This is called a *Great Aviſandum* in oppoſition to the ordinary

dinary *Aviſandum*, whereby the Ordinary upon any dubious Point returns this Anſwer to the Advocats, *That he will give the Lords Anſwer*, that he will adviſe with the Lords.

The main Defenſe competent in *Reduction* beſides thoſe which are common to all other Actions, upon the *Executions* and *Order*, are firſt, upon the Purſuers *Title* and *Production*, That it cannot give him any intereſt to *reduce*, or *improve* any of the Writs called for. And if his intereſt be ſuſtained, then the Defenſe runs upon regiſtrat Writs. If they be regiſtrat in the Books of Council and Seſſion, the Defender alledgeth, No Certification, becauſe he condeſcends upon the time of the Regiſtration, whereby the Purſuer is obliged to ſearch the Regiſter, and to inſiſt againſt the Clerks to produce the principal Writs regiſtrat. But if they be regiſtrat in inferior Courts, Certification will be granted, unleſs the Clerk of the Court be called. But if he be called, his not compearing, or not producing, is upon the hazard of the Defender: and the condeſcending on the Date of the Regiſtration, will not be ſufficient in that Caſe; but the Defender upon his own peril, muſt ſearch for the principal, and produce them. But if the Writs alledged regiſtrat in the Books of Seſſion, be not found therein, according to the Condeſcendence; Certification will be admitted againſt the ſame.

There is alſo an ordinary Defenſe againſt the Production of *Appriſings*, That the Charter and Seaſin following thereupon, are produced; and that before the year 1624. *Appriſings* were left at the *Signet*, as Warrants thereof: ſo that no Certification can be granted againſt ſuch. Neither will Certification be granted againſt the Executions of *Warnings*, or other Executions of Summons, which are ſmall inconſiderable Papers, eaſely loſt) if *Reduction* or *Improbation* be intented long after obtaining of Decreets. But the Regiſtration of Seaſins will not ſtop Certifications againſt them, becauſe the principal Seaſin is not left at the Regiſter. The like holds in *Reverſions*, *Aſſignations* and *Fikes* thereto, and in Writs *regiſtrat* during the *Uſurpation*, when the principals were given back to thoſe that regiſtrat them. But the chief Debate anent Production is, about the general Clauſe, whereby it is craved that the Defender may produce *all Writs and Evidents made and granted by the Purſuer's Predeceſſors and Authors of, and concerning the Lands and Rights in queſtion*. As to which it is alledges, No Certification againſt Writs made by the Purſuer, and his Authors, unleſs his Right and Progreſs from theſe Authors be produced: which is ſuſtained, and the Certification ſo qualified. Albeit it be ſometimes debated that the Purſuer being *Infeft*, and in *Poſſeſſion* of the Lands; eſpecially if he can alledge, That he hath produced a Progreſs of fourty years time, which by the Act of Preſcription 1617. if clad with Poſſeſſion *uninterrupted* during that time, maketh an abſolute Right, againſt all deadly; it ſeems to give intereſt to all for, and reduce the *oppoſit* Rights made by whomſoever, whether the Purſuer ſhow that he hath Right from the Authors thereof, or not: eſpecially ſince the Act of Parliament 1617.

It uſeth alſo to be alledged, No Certification againſt Writs made to the Defenders, and their Authors, unleſs theſe Authors, or ſome repreſenting them, were called: which the Lords will ſuſtain, becauſe no man is obliged to diſpute his Authors Right, unleſs he be called. But it will ſuffice to call his apparent Heir: and the Rights belonging to the Defenders, may be produced, albeit they be not actually *entered Heirs*, or *infeft*. And therefore the general Clauſe is ſuſtained, as to All Writs and Rights granted to the Defenders

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and their Predeceſſors *to whom they may ſucceed* jure ſanguinis, or againſt *All* Writs granted in favours of their *Authors*, and in favours of theſe that their Authors might *repreſent jure ſanguinis*, if the Authors, or any that do, or might repreſent them be called. But Certification will not be admitted againſt Writs granted by the Purſuer's Predeceſſors, except ſuch Predeceſſors to whom he is actually ſerved Heir, *immediately*, or by *progreſs*.

It uſeth alſo to be alledged, that no Certification can be granted againſt the *Writs* called for, but ſuch only againſt which a Reaſon is libelled: which is taken off when *Improbation* is included. Becauſe that Reaſon, *That all the Writs called for, are forged falſe and fenzied*, reacheth all: and where Improbation is not libelled, the common Alledgence upon *Nullities*, or the like, uſeth to be inſert. And if a Reaſon be libelled that may reach them, the Purſuer is not obliged to diſpute, Whether the Reaſon be relevant ot not. And therefore as the Nullities upon the Subſcription of original Rights, ſo generally Nullities of regiſtrat Writs are libelled, as being Acts or Decreets extracted contrary to the Warrant of the Judge.

There uſes alſo *incident Diligences* to be raiſed, and produced to ſtop Certification. Which incident Diligences are Summons of *Exhibition* againſt the Havers of any of the *Writs* called for; eſpecially againſt the Defenders Superiors, Authors, and others. For albeit the Superior, and other Authors might be called; yet if they compear not, the Defenders compearing ought not to loſe their Rights. And therefore Law allows them time to uſe Diligence for recovering of their Rights, not only during the *Terms* of Production, but alſo ay and while the *Incident* be diſcuſs'd.

But the Incident will ſeldom be ſuſtained, for recovering the Defenders own Writs: becauſe without conſideration of the Dependence of the Proceſs, he had ſufficient intereſt to purſue the *Exhibition*, and *Delivery* of theſe; unleſs they were common Writs, of the Defender's Lands and Rights, and of other Lands and Rights, the cuſtody whereof did not belong to the Defender, by the *agreement* of Parties, or becauſe he hath the *leſſer Intereſt*: or, unleſs the Defender be, or hath been *minor*, and the Writs in the hands of his Tutors, or Curators. So as it is the Defenders fault that he hath not his own Writs: and therefore cannot thereby delay the Purſuer, but muſt content himſelf with the ordinary *Terms* of Production.

If the *Terms* of Compearance in the *Incident* be not paſt before the *Term* of production in Reductions, or the *firſt Term* in Improbations; it will not be ſuſtained, nor ſtop the courſe of the *Action*. But if the Incident be raiſed and execute *debito tempore*, and all Solemnities and Formalities exact therein, it will be ſufficient: but in the mean time the ordinary *Terms* will proceed, not only for the Writs for which the Incident is ſuſtained, but ſpecially for all other Writs called for. For it were againſt reaſon, that after the Incident is ended, any Terms of Production as to theſe Writs ſhould then be demanded.

In diſcuſſing the Reaſons of Reduction there is little ſingular from ordinary Actions. For the Reaſons are in effect the Libel, and as in any particular Libels concluding either againſt divers Writs, or againſt the ſame Right *ſuper diverſis medits*. And therefore the Defender's Exceptions againſt the Reaſons

tions, are not designed an *Answer* as in a Suspension, but a *Defense* whereunto to the Pursuer *replys*, the Defender *duplys*, &c. until the Points be discussed and *Litiscontestation* be made.

The Pursuer may insist against any Writ he pleaseth, *primo loco*: and upon any *Reason* may make *Litiscontestation*, and may obtain Decreet, and thereafter may insist against the rest of the Rights. But if he make no preference, the Defender may propone his Defenses against any of the *Reasons* of Reduction, he pleaseth to choise first.

Upon the discussing of the Reasons of Reduction, *Litiscontestation* is never made for proving any thing by Writ, as the progress of any Right: because the Certification *contra non producta*, cuts off all other Writs but such as are produced. So that whatever can be alledged upon Writ is *instantly* verified.

Yet *Litiscontestation* may be made for proving Points of Fact, as the proving of *Minority*, *Interruption* by possession, Deeds of *homologation*, and others, which may be proven by *Oath* of Party, or by *Witnesses*.

Thus *Litiscontestation* is cleared in all kinds of Processes: and it is the main Point in all of them, fixing the same, and ordering, not only the *matter* to be proven, but the *manner* and Terms assigned for Probation.

After Acts of *Litiscontestation* are extracted, both Parties are *in tuto* till the Term pass: if they do take out *Diligences* for proving the Points admitted to their Probation; whether it be for exhibition of Writ, for proving of Points found probable by *Writ*, or for citing the Parties to compear and depone upon Points referred to their Oaths, with Certification to be holden as *confess'd*, if they compear not. For albeit in discussing of Suspensions or Advocations, Chargers do not put Suspenders, or Raisers of Advocation, to take Terms to cite them, which would give them delay, but their Advocats do take the shortest Terms they can, to produce them to depone; yet in other Cases, when any Point is referred to a Parties *Oath*, he must be cited by a *Malleneer* at Arms, *personally* apprehended, with Certification to be holden as *confest*. And if the Point to be proven be by *Witnesses*, Diligences are granted, to compell the Witnesses to compear. For which there were many Terms granted, and more to the pursuer (who was not presumed to delay himself) than to the Defender; which were in the way of *Letters of four Forms*: the *first* being only a Citation to compear and bear Witness, the *second* a Citation with certification that Letters of Horning would be direct, the *third* a Horning, the *fourth* a Caption. But now these being long out of use in any Case, there are only two Diligences granted against Witnesses, either for the Pursuer or the Defender; the *first* by *Horning*, the *second* by *Caption*.

The Diligence for production of Writs to prove, are either *ordinary* or *incident*. Ordinary Diligences are competent to Parties, even for recovering of their *own* Writs; but incident Diligences are for recovering of Writs belonging to *others*, at least are in the hands of Tutors and Curators. For when Parties are to prove by other mens Writs, they have no Title to crave them exhibit the same, but incidenter, as they may be made use of in Proceiling. And therefore they are called *incident Diligences*, being in the re-

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nor of an Exhibition of Writs for inducing any Point of *Right*, or *Fact*.

Incident Diligences were formerly moſt tedious, expenſive, and wearieſome to Parties. For the uſer thereof might, for proving that the Party cited had the Writs he called for, make uſe of Witneſſes, and thereby had four Terms to cite the Witneſſes. And if thereby he obtained Decreet of Exhibition, he had Terms againſt the Havers, by Horning and Caption, and ſeveral Terms alſo againſt Magiſtrats to put the Caption in Execution. All which Defenders were ready to *pretend* neceſſary, when they *knew* there was nothing to be found, and did it only to procure delay.

But by the Act of *Regulation* theſe Delays and Pretences are much cut off. For as the Subjects in every Society are oblieged to promove Juſtice, by bearing witneſs upon their Oaths, ſo are they oblieged to depone, whether they have any Writs that may prove the thing in controverſie, and if they acknowledge the *having* thereof; they ought to *exhibite* them *ad modum probationis*. Therefore incident Diligences do now proceed by Horning againſt the alledged Havers, charging them to appear and depone whether they have the Writs called for, and to produce them in ſo far as they have them: and if they obey not the Charge of Horning, Letters of Caption are direct to incarcerat them, till they depone, and exhibite what they acknowledge.

There be three ſorts of Oaths: Oaths of *Verity*, Oaths of *Calumny*, and Oaths *in litem*. Oaths of Verity do *affirm* or *deny*, the truth of the point refered thereto: wherein if the Deponent deny, he may either do it *ſimply*, or *qualifice*, ſo far as he *knoweth* or *remembers*; in which caſe his Oath will not exclude other Probation. But if his Oath be *affirmative*, he may not ſo *qualifie* the ſame.

Oath of Calumny doth only require the Party to depone, That he doth not *calumnioufly* alledge any Point, *knowing it not to be true*: but that he *believes* it to be *likely*. And if by this Oath, he do not ſo aſſert the Point offered thereto, or be holden as confeſt for not deponing; it is a ſufficient Probation againſt him. There is not ſo much conſideration to be had in the Oath of Calumny, of the *Juſtice* of any Point, which the Judge ſhould determine; but of the Partie's *opinion* of the *verity* thereof. For by our Cuſtom Oaths of Calumny are not taken, till the Lords ſuſtain the Relevancy. Nor are Purſuers put to depone *de calumnia* upon the whole Libel, before it be diſcuſſed. If the Party be preſent, whoſe Oath is craved upon the Libel, or Alledgance, he muſt either depone, or be holden as confeſt: and if abſent, he may be cited by a Meſſenger, with that Certification which goeth on as a diſtinct Proceſs.

Advocats are alſo put to depone *de calumnia*, that they do not *invent* their Alledgances, but were truely ſo *informed*.

When Witneſſes are allowed to prove, the Act bears, thoſe Points in which they are allowed to prove *To be proven pro & contra*. For by our Law, Witneſſes are not admitted to prove matters of importance, where Writ uſeth, and may be interpoſed to ſecure againſt Perjury, and as a penalty upon the negligence of thoſe who might have made uſe of Writ, and did not. As the *Romans* did exclude *naked Pactions*, without *Stipulation*; ſo Witneſſes can-

cannot prove the *lending* or *delivery* of Mony, above an hundred pound *Scots*. And they can in no caſe prove *Promiſes*, *Commands*, or *Warrants*. Neither can Witneſſes be taken to take away *Writ*, except as to delivery of *Victual*.

The Terms of Probation being come, and bygone, either Party againſt whom any Point is to be proven, cauſeth the Clerk call the Act of *Litiſcontestation*, and the Advocats thereinmentioned, and intimats to the parties *to ſatisfie the Deſire of the Act*; and thereafter the Act is called by the Ordinary, before other Cauſes be diſcuſs'd.

The Act having been firſt intimat by the Clerk, and thereafter called by him before the Ordinary, the Advocats therein mentioned are called to the Bar, and then the Purſuers Advocat craves, *That the Term may be circumduced:* and oftimes much time is ſpent in relating of the Cauſe, and Tenor of the Act; eſpecially by the Defenders Advocats, who many times have need to bring themſelves in remembrance of the Cauſe by ſpeaking of it: for avoiding whereof, The Sub-clerk who calls the Act ſhould peruſe it, and be in readineſs to relate to the Ordinary in a word, what is the Point to be proven: which may be done without ſo much as repeting the Proceſs, but only the kind of the Action, and then whether the ſame, or a Defenſe Reply, or Duply was admitted, reading the *interlaqutory words* of the Act, which expreſſes what was admitted to Probation.

The ordinary *terms* accuſtomed in ſuch Caſes are, that the Advocats who cauſe call the Act craves, *That the Term may be circumduced*, or *That certification may be granted*, or ſpecially, *That the Party may be holden as confeſt*, if that be the certification.

Likewiſe the Purſuer cauſeth call the Act when any *Defenſe*, *Duply*, or *Quadruply* is admitted to the Defender's Probation. In which Caſe he craves, The Term to be circumduced againſt the Defender. As alſo, if the Purſuer be to prove the Point by the Defender's Oath, then he cauſeth call the Act and craves, The Defender to be holden as confeſt.

If the Point, whether it be the Reply, or Triply, be to be proven by the Purſuer, then the Defender calls the Act and craves, The Term to be circumduced againſt the Purſuer. Or if the Defender be to prove any thing by the Purſuer's Oath, then he craves, The Purſuer to be holden as confeſt. But if there be Points to be proven *hinc inde*, as if the Defence do not acknowledge the Libel; then if the Purſuer call the Act, albeit the Defender call not at the ſame time, yet he will alledge, That Certification cannot be admitted, until the Purſuer prove his own Libel, and prove the Quantities, or Prices: which will be either granted, or at leaſt no Decreet can be granted, till the Purſuer's part be proven; and whatever the Defender produceth *medio tempore*, will be admitted: but regularly Certification ſhould not be admitted. The ſame holds in other Points of the Proceſs, to be proven by the Defender, when the Defenſes do not acknowledge the Points to be proven by the Purſuer. But if the Defenſe acknowledge not the Libel, nor the Reply the Defenſe; then if the Purſuer call, and renounce Probation as to his Libel, he may crave the Term to be circumduced for not proving the Defenſe, though he prove not the Reply, that being only neceſſary to be proven in caſe the

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Defense be proven. As if the Defense be *Compensation*, and the Reply be *Recompensation* or discharge of that Debt, whereupon the Compensation is called; if the Pursuer prove the Debt, he may crave the Term to be circumduced against the Defender for not proving the Debt, whereupon he craves Compensation, albeit the Pursuer prove not the Reply. In this case also the Defender may crave the Term to be circumduced against the Pursuer, for not proving of his Libel, albeit the Defender prove not his Defense. But if the Pursuer adduce Probation, or use Diligence for proving of the Libel, the Defender cannot crave the Term to be circumduced against the Pursuer, for not proving his Reply, till the Defender prove his own Defense. The like holds in the Duply, or in any other Point.

The Term may be circumduced, and yet no Decreet pronounced. As if the Pursuer have adduced probation of his Libel, Quantities, and Prices not acknowledged by the Defense, and renounced Probations, he may crave the Term to be circumduced against the Defender; to the effect the Cause may be *concluded* and *advised*.

In Circumduction of the Term, or granting of Certifications, the Ordinary useth to do it *conditionally*, That what shall be produced betwixt and such a time, shall be received: (especially if the Defender's Advocat declare, that the Writs called for, are not at present in his power, but that he expects the same) the time of which Qualification is in the discretion of the Ordinary, who will give longer time, if any impediment or hinderance appear. Item if the Point be to be proven by *Oath* of Party, and at calling of the Act, the Advocat for the Party who is to give his Oath, produce Testificats of his *Sickness* or *Infirmity*, or other necessary obstacle or impediment: and therefore craves a further Term, or Commission, which will be granted, if the Testimony be upon *Conscience* from known Persons; especially Ministers, and Physitians. Especially if that obstacle was not known to the Partie's Advocat, when *Litiscontestation* was made, but *emergent*, and new come to Knowledge. And though it be not sustained, yet if there be any probability therein, the Term will be circumduced *conditionally* to such a Time, that the Party holden as confest may compear and depone. And these *conditional Circumductions* the Lords, upon Supplication, do oftimes prorogat, as they see Cause.

In posterior Diligences, there is only Warrant granted to cite such Witnesses as were in the former Diligence, unless there be a Warrant for it by the Lords, upon the *emergency* of the notice of further Witnesses, or the Death, or Removal of others before cited: and regularly no more than twenty four Witnesses can be adduced for the same Points.

Witnesses will be received upon the very Day of compearance assigned for them: and they are brought judicially to the Bar, and the Parties being also called to the Bar, their Oaths are taken by the Ordinary, who may hear and discuss the Objections made against them, or may refer the Objections till the afternoon, to be received by those who receive and examine the Witnesses. Who, if any Debate arise upon any Objection, will ordain the Witnesses to attend the next Day, and in the mean time will advise with the Lords thereanent. In some cases, also Witnesses are sequestrat, that neither Party may have access to them, that so they may be more free, and their Testimonies without corruption.

Objections againſt Witneſſes as all other Dilators, muſt be inſtantly verified; Witneſſes not being obliged to attend, till the verity of the Objection be proven. Nor are two *Litiſconteſtations* admittable, regularly, in one Cauſe. Therefore *Reprobators* have been ſometimes proteſted for, but the effect thereof hath been very rare.

Requiſites of Witneſſes are, That they be *famous*, *equal*, and *inconcerned* in the *Parties*, or *Cauſe*. Hence ariſe the Objections: 1. That the Witneſſes are *infamous*, as being ſo cognoſced and declared by the Sentence of a Judge competent, as by the *Counſel and Seſſion*, and *Juſtice General*.

2. Upon the ſame Point of Infamy, Perſons known to the Lords to be debauch'd, or in no reputation, (albeit they be not ſo *judicially* declared,) will be excluded: and ſuch as are not worthy the Kings *Unlaw*. Upon which ground it is, that *Beggars* are excluded.

3. Witneſſes are excluded upon their Intereſt in the Adducer, and that either by *Conſanguinity*, *Affinity*, or *Service*. By Conſanguinity, *Couſin-germans*, or of a nearer Degree, are excluded. And where there is not *penuria teſtium*, ſometimes Witneſſes adduced of a further Degree, will be excluded, as in *penuria teſtium*, Degrees regularly prohibite, will be admitted.

The Degrees of *Affinity* are not ſo clearly determined. But, unleſs there be *penurie*, the ſame Degree is likewiſe to be obſerved in Affinity as is Conſanguinity. But there is no *affinitas affinitatis*: and therefore a man will not be admitted in the Cauſe of his Wif's *Brother* and *Siſter*, but he may be Witneſs in the Cauſe of his Wif's Siſter's *Husband*; becauſe that is but *affinitas affinitatis*. Much more in Caſes more remote.

As *Intereſt* in the Adducer, ſo *Prejudice* or *Enmity* with the other Party, may exclude Witneſſes: who in that caſe are not preſumed to be *equal* and *impartial*.

And likewiſe upon the Point of Intereſt, not only domeſtick *Servants*, but moveable *Tenents*, who may be removed at the arbitriment of the Adducer, having no ſtanding Tack, nor Infeftment; are not ordinarly admitted: but Vaſſalls, and Tenents having a Tack are.

Witneſſes are alſo excluded upon *inequality*, if they have given partial Counſel, in prejudice of the Party againſt whom they are adduced; or have received, (or accepted a Promiſe of) any benefit or good deed, for bearing teſtimony, other then the ordinary Expences allowed to Witneſſes. And therefore albeit theſe be not objected againſt the Party, the Lords uſe to cauſe Witneſſes purge themſelves of *partial Counſel*, which they explain to them, not only of their partiality by *good deed*, whereby they may be preſumed to have promiſed, and intended not to be exact in the truth of their teſtimony; but alſo if they have ſtirred up the Party to the Plea, and promiſed to bear Witneſs for him, and adviſed him how to mannage it.

The Point of *Intereſt* in the Cauſe excludes Witneſſes, not only if they may *tine* or *win* in the Cauſe, as being ſharers therein; *ſed ſi foveant conſimilem cauſam*, whereby they may be ſuſpected to give their teſtimony ſo, as may advantage the intereſt of the like Cauſe, wherein they are concerned.

But in all Caſes, there is much in the arbitriment of the Lords: wherein they ponder the *Moment* of the Cauſe, the *antiquity*, and *capacity* of Witneſſes, whereby ſometimes VVitneſſes who by their Circumſtances, appear to be *neceſſary* VVitneſſes, are admitted contrary to the ordinary Exceptions.

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And albeit in civil Caſes, the Lords do not admit VVomen; yet in ſome Caſes, wherein they are neceſſary VVitneſſes, they will be adduced even in matters of greateſt Moment. As if the Queſtion be concerning the return of Tocher, or the Enjoyment of a Joynture, and if it be alledged, That albeit the Marriage was diſſolved within year and day, yet there was a *living Child* born and heard *cry* and weep; in this caſe, the Mid-wife, and other VVomen who were preſent at the birth of the Child, will be admitted VVitneſſes, as being neceſſary, being men uſe not to be preſent at that time.

Sometimes alſo the Lords will admit VVitneſſes *cum nota*: and generally, when VVitneſſes are examined *ex nobili officio*, all VVitneſſes whatſoever are admitted, and the Lords conſider how far to make uſe of their Teſtimonies, at the adviſing thereof.

The Probation being cloſed, the Cauſe comes to be concluded. VVhich is two wayes: for either the Purſuer renounceth Probation, and refers the Cauſe to the Lords; or otherwiſe, if the Defender have adduced Probation, and have no more Terms current, or competent, then the Purſuer doth proteſt, That the Cauſe may be holden as Concluded, which alſo will be admitted.

At the concluſion of the Cauſe, when VVrits are produced, the Producer is not obliged to diſpute that the VVrits produced will prove, or not; yet it muſt appear, that the VVrits have contingency with the Points to be proven: for the production of any VVrits, is not ſufficient, and will not ſtop the Circumduction of the Term; but notwithſtanding thereof, if they make nothing to the Points to be proven, the Term will be circumduced.

VVhen Commiſſions are granted to examine VVitneſſes in the Countrey, the Term will be circumduced if the Report be not produced. And if it be produced, but contain no Teſtimony of VVitneſſes, but the Procedure of the Commiſſioners; there the Diſpute ariſes, whether he who was to report the Commiſſion, or the other Party have failed or not: for if they have failed, the Term will be circumduced. And therefore they alledge theſe Reaſons to purge their failzies. 1. That the Commiſſioners, (one or more) neceſſary to have proceeded, kept not the Dyet, or that having kept it, they refuſed to examine the VVitneſſes in reſpect of the other Parties not compearance, upon any Queſtion ariſing, whether the Witneſſes were receivable, yea or not: wherein the Commiſſioners are to follow the common Rules of Exceptions againſt Witneſſes as aforeſaid: and if any extraordinary Objections be alledged, they may mention the Objections, and receive the Witneſſes; but they may not reject the Witneſſes, but ought to leave it to the Lords conſideration, what uſe they will make of the Teſtimony. And therefore if they reject the Witneſſes without the ordinary Exceptions, the Party grieved will alledge, That the Commiſſion ought to be renewed to them, with order to receive theſe Witneſes which they have refuſed; or to other Commiſſioners; or that the Witneſſes ought to be called before the Lords. Or if the Commiſſioners refuſe to examine the Witneſſes, upon the Interrogators propoſed, if the Lords find theſe Interrogators pertinent, they will grant a Commiſſion and ordain the Witneſſes to be examined thereupon. Or if any accident hath befallen the Party, who was the Adducer of the Witneſſes, or other conſiderations occur, moving the Lords, they will either grant Commiſſion *de novo*, or otherwiſe a Term to adduce Witneſſes before themſelves.

When any Party craves Commiſſion to adduce Witneſſes in the Country, it is upon their peril of moving the Witneſſes to appear. For in that caſe they are not to expect Terms, and ſeveral Diligences, as if they adduced them before the Lords: the very demanding of a Commiſſion importing a paſſing from the ordinary Terms, if the ſame be granted.

Cauſes being concluded in manner foreſaid, there ought to be an Act extracted thereupon. After which it comes to be adviſed. The *Saturday* ordinarly is ſpent in adviſing concluded Cauſes: and either Party may proteſt *to be heard*, at the *adviſing of the Cauſe*, as they think fit. But whether Parties do proteſt or not, the Lords doth always call them, and hear them: If the Probation be by *Writ*, or by *Oath*, containing any *Quality*. But if the Oath be *ſimple* and plain, the Lords will adviſe without calling the Parties. Or if the Probation be wholly by Witneſſes, the Teſtimonies are not publiſhed unto the Parties: and therefore the Lords adviſe the ſame with cloſs Doors.

If the Probation be by Writ they are heard, Whether the ſame prove or prove not, and the whole Writ, or the Clauſes in queſtion, are read in audience of the Parties.

In like manner Objections are competent againſt Nullities of the Law, which are viſible in the Writs adduced: as *want* of Witneſſes, or Writer, or Witneſſes not *deſigned*, or as *vitiat in ſubſtantialibus*. Yea not only Objections are competent, but Exceptions that may elide the Writ produced, are alſo competent; eſpecially if in the Act there be a Reſervation to alledge a *contra producenda*.

And if the Alledgence doth elide the Writ produced, it ſhould be ſuch, as could not have been known the time of the *Litiſcontestation*. But the Alledgence ought to be inſtantly verified, except in ſingular Caſes, in which there will be a new Probation admitted, which makes an exception from the common Rule, That there cannot be two *Litiſcontestations* in the ſame Cauſe.

There are alſo frequent Debates upon qualified Oaths, Whether the quality adjected be competent, or not. Wherein this a general Rule, That whatſoever the Alledgence referred to Oath, relates to any Writ, Fact, or Deed wherein the Alledger pitches upon what makes for him, admitting the other Points and Circumſtances, when it is proper for the Deponent to expreſs the whole tenor of the Writ, Bargain, Promiſe, or Fact, as well that makes againſt him as for him. And theſe are called *intrinſick* Qualities: becauſe the Qualifications or Conditions are *inherent* in the ſame Fact, or Right. As if a Party be purſued on an alledged Bargain for delivery of Victual, or Ware, at the prices libelled; if he depone, It was true the Bargain was made, but with this Condition, if the Mony was not delivered againſt ſuch a time, the Bargain ſhould be void; And that it was not delivered, nor offered at that time; this is a competent Quality. In like manner, if one be purſued for a Debt, or for a Promiſe made, or Goods delivered; as the libel, if it be referred to Oath, will not be relevant, except the Subſumption bear, That the ſame is *reſting, owing*, or *unperformed*, ſo the Deponent doth properly and plainly depone, both upon the truth of the Debt, Promiſe, or Receipt, and alſo that the Debt is not reſting, but was payed and received, either by the other Party himſelf, or others by his direction, and warrand. Nor will he be obliged to produce or prove theſe: ſeing his Obligation is not proven by Writ, or Witneſſes. In which laſt caſes, the Preſumption of Not-payment, and Not-performance being negative, transfers the *onus probandi*: and therefore Payment or Performance muſt be proven.

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But there are other Qualities *extrinsick*, and unproper, which will not be admitted by way of Quality, to be proven by the Deponent's own Oath: but ought to have been proponed and proven by Exception. As if a Party being pursued for a Debt, acknowledge the same, but depones, That the Pursuer was owing him as much: this is extrinsick, and resolves in an Exception of *Compensation*. And therefore will not be regarded in the Oath, but the Defender will be decerned, *reserving his Action* for that other Debt *as accords*. Yet if it be dubious, whether the Quality be competent or not, the Lords will sometimes find it relevant as an Exception, and assigne a Term for proving thereof, or will decern, and preserve that Alledgence *contra executionem*, by way of Suspension.

At the advising of the Cause, many times new Defenses and Alledgences are proponed, which are received, if *instantly verified*, but not otherwise, though emergent or new come to the Proponer's knowledge, unless he have raised Reduction of the Act of *Litiscontestation* thereupon, or upon Nullities: as if it hath been extracted contrary to the *Minutes*, or *meaning* of the Lords. But such Alledgences emergent, or new come to knowledge, may be reserved by way of Suspension, or Reduction: for thereby the other Party gets Decreet, and may use Inhibition, or other real Execution thereupon, and get Caution before he be put to dispute these Points.

When the Lords proceed to advise the Cause, they either find the Points referred to probation *proven*, or *not proven*. Or otherwise they find the same *proven simpliciter*, or they find the same *sufficiently* proven *ad victoriam causæ*, that albeit all that was offered to be proven, be not fully proven, yet that as much is proven as alone would have been relevant.

If the Lords at the advising of the Cause, find some Points not clear, they will ordain such further Probation to be adduced by either, or both Parties, as they see fit. If they find *semplenam probationem*, they will, *ex officio*, take the Oath of either Party for their further evidence of the Truth. And after this will proceed, till they advise the Cause *de novo*.

After all that the Lords find necessary for a finall Sentence, is done and they have advised the Cause, they pronounce Decreet condemnatory, or absolvatory, according as they find proven or not proven by the Probation. Against which, till it be extracted, either Party by Supplication may represent what they desire: which the Lords will take in consideration, and the Supplication and Interlocutor thereupon, will be insert in the Sentence.

The Decreets of the Lords (being the Supream ordinary Judicatory in all civill Causes) is unquarrellable upon point of *Iniquity*: and therefore nothing that was *proponed* and *repelled*, will be admitted in the *second* Instance *super eisdem deductis*. Whereby it is not meant that those Sentences are not quarrellable, unless there be new considerations or reasons *in jure* alledged; but that unless there be new reasons and new matter *in facto*. Neither is that receivable in the second Instance, which was *competent* in the first Instance: but what is emergent and was not competent the time of the *Litiscontestation*.

The Lords are not so ready to reduce or suspend their Decreets upon Points and Reasons not emergent: but it being alledged, that either the

matter of *Fact* is new come to knowledge, or at leaſt the *Writs* or *Evidents* for proving thereof, (it being hard to inſtruct what was, or now is in the knowledge of the Partie) the common Rule is, *Prætextu novorum inſtrumentorum non retractantur ſententiæ.* Yet the Lords will ſometimes, when they ſee it is without all ſuſpition of fraud or negligence, admit what is *new come to the Parties knowledge*, though not *emergent.*

Neither will the Lords recall Decreets upon *Certification*, or *Circumduction* of the Term, eſpecially Certifications in Improbations; neither any other but upon ſingular Reaſons impeding the Party to keep the Term, or otherwiſe upon *emergent* Writs, inſtructing that wherein the Party ſuccumbed, or *new come to knowledge*, without any ſuſpition of fraud, or the Partie's deſigning to delay.

This is the ordinary *Form of Proceſs* before the Lords of *Council* and *Seſſion*: then which there can be nothing more rational, more regular; every Form being the product of long experience, from clear reaſon and neceſſity. For the Lords are ſtill ſupplying and perfiting, as they ſee cauſe: and whatſoever ſeems convenient at firſt, if it prove afterward inconvenient, is laid aſide. So that what is retained, is that which hath for a long courſe been found rational and convenient.

But beſides the ordinary Form, many things are incident, in Proceſſes, which are *extraordinary*, and fall not under the ordinary points of Proceſs; at leaſt, in the ordinary way: which therefore are offered to the Lords by *Supplication*, and propoſed in the time of the Diſpute *verbo*, not comprehending any Defenſe, Reply, or Duply. Such as the Sequeſtration of *Goods* in queſtion, or the *Sequeſtration* of *Mails and Duties* of Lands, or naming *Factors* for uplifting the ſame *medio tempore*: the taking of the *Oath* of Parties, or Witneſſes, to remain *in retentis*, before the ordinary time, if they be ſick, or going out of the Country, or very old: yea when perſons are near the point of Death, the Lords will ordain them to be examined upon Supplication, although the Proceſs be not ſo much as called.

Such are alſo the *Production* of Writs, or *Exhibition* of things in queſtion: the *Sequeſtration* of *Re-examination* of Witneſſes: and many ſuch Deſires as neither came within the compaſs of Reply, or Duply.

In like manner Points *emergent*, or *new come to knowledge*, are repreſented by a Bill at any time during the Dependence, and are then admitted. And alſo whatſoever hath been forgotten, the Lords will receive, before the Acts, or Sentences be extracted: and before theſe are extracted they will rectifie the ſame, upon Supplication, if they have been extracted otherwiſe then according to the *Minuts* of Proceſs, and meaning of the Lords; eſpecially when the Complainers Advocat hath not ſeen the Scroll, before extracting, or his Objections thereanent have not been conſidered. But nothing ſhould come in by Bill (which is an extraordinary Remedy) where an ordinary Remedy is competent: and therefore, whilſt a Cauſe is in diſcuſſing, Parties are ordained to make their addreſs to the Ordinary, and ought not to trouble the Lords with Bills. But if the Ordinary's time be paſt, and the Act or Sentence not extracted; if they have neglected any Point, they may repreſent it to the Lords, by Bill, which the Lords of courſe will refer to the Ordinary, who heard the Cauſe: who comparing the Bill with the Proceſs, if he find any thing new therein, will hear the Parties thereupon. But if the Supplicant reſt not ſatisfied, but urge that he may have the *Lords Anſwer* upon the Bill; the Ordinary upon an *Amanuda*, will not refuſe it.

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Reprobators alſo, may be uſed during the Dependence of Proceſs, for rejecting of *Witneſſes*, or their *Teſtimonies*. For ſeeing no Exception againſt the *hability* of Witneſſes is receivable, unleſs it be inſtantly verified, when they are examined; Parties may raiſe *Summons of Reprobator*, even before the Witneſſes are examined, when they ſuſpect ſuch Witneſſes as are cited againſt him; to the effect that thereupon they may cite VVitneſſes to prove their grounds of *Reprobator*, at the Term aſſigned for the VVitneſſes to appear. Or they may proteſt for *Reprobators*, when the VVitneſſes are examined, and raiſe, and inſiſt in the ſame, before Decreet be extracted: which is the moſt proper way of Reprobators, and whereupon the Lords will ſuperſede to advife the Teſtimonies (if they ſee probable evidence of the *inhability* of the Witneſſes) till the Reprobation be firſt adviſed. But if Parties neither raiſed Summons before the examination of the VVitneſſes, nor do then proteſt; they are preſumed to acquieſce in the hability of the VVitneſſes, unleſs the VVitneſſes be adduced in abſence.

But even after Sentence, Reprobators are *Competent*, though far leſs *favourable*, (and after a conſiderable time ought not to be admitted;) becauſe if they be inſiſted in, ſhortly after Sentence, the Adducer of the VVitneſſes, if any of their Teſtimonies ſhould come to be rejected upon inhability, might adduce more VVitneſſes for the ſame Point, unleſs by the Probation he were found acceſſory, to the Corruption of the VVitneſſes.

Reprobators cannot proceed upon pretence of the *falſhood* of the Teſtimony, but upon the *incapacity*, or *inhability* of that Party to be witneſs in that Cauſe. VVhich will not be excluded, becauſe the VVitneſſes have deponed, either generally, or particularly, concerning their *hability*; whether upon the motion of the Judge, who ordinarly purgeth all VVitneſſes of *partial Counſel*, or upon the Alledgence of the Party referring any Objection to their Oath. The reaſon of the difference is, becauſe the Teſtimony in the Cauſe could not prove, unleſs there were other VVitneſſes concurring: but as to the *hability*, there is no ſuch concourſe, every VVitneſs Deponing for himſelf. But if the ground of Reprobature be referred to the Oath of the Adducer of the VVitneſſes, it will be moſt favourable, and ſuſtained; except the Adducer be alledged *author* of, or *acceſſory* to the Corruption; which could not only be *criminal*, but *capital*: and therefore he is not obliged to depone thereanent, after Sentence, when the Corruption hath become effectual.

The main ground of Reprobators, is the Corruption, or Prevarication of the VVitneſſes. For if before the Teſtimony quarrelled, they have ſworn inconſiſtently therewith, it will canvel the Teſtimony upon Prevarication, and infer Infamy; but no Oath emitted thereafter, will weaken the former Teſtimony. Eſpecially *poſt ſententiam qua jus eſt acquiſitum parti*. Albeit in Re-examinations, recently taken, if there be Prevarication, and Inconſiſtency; the Lords *proprio motu* will reject the Teſtimony.

Giving or promiſing *good Deed*, beſides the ordinary Expenſes, and prompting, and inſtructing VVitneſſes how to depone, or threatning them if they do not ſo, or ſo, depone; are pregnant grounds of Corruption and Reprobature.

Giving *partial Counſel* by inſtigating the Parties to the Plea, and promiſing to depone for him likewiſe a relevant Reaſon of Reprobature. And likewiſe the *Infamy* of the *Witneſſes*: as being before condemned for an atrocious Crime, or declared infamous. And likewiſe intereſt in the Cauſe: whereby the *Witneſſes* may have a conſiderable Gain or Loſs.

But there be many other Exceptions which might exclude a Witneſs before Examination, that will not be ſuſtained by way of Reprobature after: in which there is a Latitude *in arbitrio judicis.* As if the Witneſs were Couſin German to the Adducer, or were not accompted a vertuous Perſon, or had given his opinion to the Party how to proceed, or been preſent at Conſultations. Or if the Witneſs, before he were adduced, had declared to the Party what he would depone, without any Promiſe, or Aſſurance, ſo to depone; or inſtigating the Plea thereby. For after Proceſs are intented, though Perſons expreſs what they know in the matter, it will will not amount to *proditio teſtimonij.*

When Reprobators are ſuſtained, to be proven by Witneſſes, they ought to be condeſcended upon, and be above all exception. Otherwiſe Reprobators may get run round, and leave Cauſes to a perpetual incertainty.

Upon the Decreets of Seſſion, all manner of Executorials do proceed in courſe, by Letters under the Signet. As for arreſting the moveable Sums, or Goods to be made forthcoming for ſatisfying the Decreet: which cannot be *Louſed* upon Caution, except in ſingular Caſes. *Inhibition,* hindering the Party decerned againſt, to dilapidat his Lands or Heritage.

Horning, for charging him to make payment, and for denouncing him Rebel if he fail. *Poinding*, for diſtraining of his moveable Goods. *Appriſing*, or *Adjudication* of his Lands and heritable Rights in ſatisfaction. And *Caption* for *incarcerating* the perſon of the Party decerned, if being denounced to the Horn, he have not performed. All which Executorials may proceed jointly or ſeverally, except only, that if the Creditor poſſeſs by vertue of Appriſing or Adjudication, he cannot detain the Debitor in Priſon.

But this *Impriſonment*, as its laſt Remedy, admits of Liberation *ſuper ceſſione bonorum*, proceeding upon Humanity, and Mercy. For albeit many Nations do allow the ſelling, or uſing the Debitor as a Slave; yet our Incarceration is deſigned but to compell him to do all things, *in his power*, to ſatisfie the Debt. And therefore when he diſpones all that he hath, heritable, or moveable, to his Creditors, and delivers the ſame and the Evidents thereof; he is ſet at Liberty, and is ſecure againſt all Creditors whom he hath cited for that purpoſe, as to his *perſonal* Freedom. Yet without prejudice to them, to uſe *real* Execution againſt any Goods that he ſhall thereafter acquire. And this Decreet doth no longer protect him, then he wears for his outmoſt Garment, the Habit appointed by the Lords for *Bankrupts*, in which he muſt come out of Priſon, unleſs this be diſpenſed with upon ſpecial conſideration, of the manner how he broke, if it was without fraud or prodigality, (as in the caſe of Merchants) if it were by Shipwrack, or Inſolvency of Debitors, or by fire, Robbery, or other accident.

Againſt this *ceſſio bonorum*, there are only two Defenſes accuſtomed: the one is, That the Bankrupt hath dilapidat ſome part of his Eſtate, ſince his Incarceration, further then his neceſſary Aliment.

The other, if the Creditors offer to Aliment him in Priſon: which can be but a dilator Defenſe, till they may have time to diſcover what latent Rights he hath, or what fraudulent Rights he hath made, before or after his Incarceration. And is with expreſs Condition, that they pay him for his Aliment, ſo much as ſhall be modified *weekly*, and if they faill *one Week*, he will be ſet at Liberty.

FINIS.